



facebook



Facebook, MySpace, Twitter, *Oh My!*

You  Tube

*Regulating the Workplace
In the World of Web 2.0*

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Agenda

- Blogging and Social Media
- Social Media in the Workplace
- Policy Recommendations
- Employee Texting
- Privacy Considerations
- FTC Guidelines

Blogging

- **What is it?**

- Web Log or personal journal posted on the Internet
- Can be accessed though the Internet
 - Usually open to public
 - Others may post comments
 - Can update to others instantly with RSS feeds
 - Links to other relevant sources
- Approximately 12+ million Americans keep blogs
- Approximately 57+ million read blogs
 - Pew Internet & American Life

Blogging

- Why do people blog?
 - Backbone Media
 - 52% blog to publish ideas and content
 - 47% blog to build community
 - 44% blog to serve as experts/thought leaders in their field

Blogging

- Who is the “typical” blogger?
 - Approx. 54% male/46% female
 - 54% are under age 30
 - 39% have a college/graduate degree
 - 42% earn more than \$50K per year
 - 83% blog from home (only 7% at work)

** Stats from Pew Internet & American Life Project*

Social Media

- Americans spend 40% of their online time on social networking, playing games, and emailing
- 96% of Gen-Y'rs use social media
- Double the number of Americans aged 50 and over are visiting social networking sites than those under 18

Social Media

- YouTube is the second largest search engine
- Facebook is the second most popular website
 - 85% of social networking is done on Facebook
- Facebook added 100 million users in less than 9 months; now over 500 million users

Social Media in the Workplace

- About 25% of employees ADMIT visiting during work hours
- About 10% of employers have terminated an employee for the content of their postings to a social networking site
- About 50% of employers now block Facebook, MySpace and Twitter
- About 1/3 of employees do not consider postings to have business implications

Facebook Faux Pas

- Back to school ... Not so fast



Facebook Faux Pas



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

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 'shit stuff' is called your 'job', you know, what i pay you to do. But the fact that you seem able to fuck-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...

And more . . .

- From a Philadelphia Eagles employee:
*"Dan is f*****g devastated about Dawkins signing with Denver...Dam Eagles are Retarded."*
- Va. art teacher terminated for YouTube video showing him painting canvas with his buttocks

And more . . .

- "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work."
- Larry Johnson – “tweeted” with slurs against sexual orientation and criticizing his coach

And more . . .

- “Rule #1 in DCPS: Don’t smoke crack when pregnant”
- “You’re a retard but I love you” from a special ed teacher
- “I only have two feelings: hunger and lust. Also, I slept with a hooker. Be jealous.”
- “I am teaching at the most ghetto school in Charlotte.”

A photograph of a classroom with several rows of white chairs and wooden desks. The title "Devious" Use of Social Media" is overlaid on the image in white text with a thin white underline.

“Devious” Use of Social Media

- Evidence of arresting officer’s social media comments admitted at trial of felony gun charges
- MySpace mood: “devious”
- “Watching ‘Training Day’ to brush up on proper police procedure”

A blurred background image of a classroom with several rows of white chairs and wooden desks. The text is overlaid on this image.

“Devious” Use of Social Media

- "If he wanted to tune him up some, he should have delayed cuffing him... If you were going to hit a cuffed suspect, at least get your money's worth 'cause now he's going to get disciplined for a ***** love tap."

A blurred background image of a classroom with several rows of white chairs and wooden desks. The text is overlaid on this image.

“Devious” Use of Social Media

- Parolee beats felony gun charges
- After trial, officer said he would now be careful to mask his identity on sites
- But can he effectively do so?

EEOC v. Simply Storage Mgmt, LLC

- 2010 WL 3446105 (S.D. Ind. May 11, 2010)
- Court allowed discovery on
 - “any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries and SNS applications for [claimants]...that reveal, refer or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce significant emotion, feeling or mental state.”

EEOC v. Simply Storage Mgmt, LLC

- **AND**

- Third-party communications to the claimants “if they place these claimants’ own communications in context”

- **AND**

- Photographs of the claimants “because the context of the picture and the claimants’ appearance may reveal the claimant’s emotional or mental status.”

Crispin v. Christian Audigier Inc.

- 2010 U.S. Dist. LEXIS 52832 (C.D. Calif. May 26, 2010)
- Court held that *some* content on social media sites was protected by the Stored Communications Act

Stored Communications Act

- Prohibits:
 - Intentionally accessing a facility through which an electronic communication service is provided...and thereby obtain...access to a wire or electronic communication while it is in electronic storage in such a system
 - 18 U.S.C. §§ 2701-2711

Crispin

- Plaintiff, an artist, alleged the defendants used his artwork in violation of an oral agreement
- Defendants sought discovery on plaintiff's social media use
 - Subscriber information
 - Communications by plaintiff about defendants

Crispin

- Court recognized validity of privacy settings of social media sites
 - Private messages protected from discovery
 - Private wall posts and commented also protected
- But how restricted does the communication have to be to garner protection?

Professional/Social Networking

- The hidden dangers of LinkedIn
 - In survey of 100 hiring managers at small, midsize and large companies,
 - 75% use LinkedIn
 - 48% use Facebook
 - 26% use Twitterto research candidates before making a job offer.
 - Sites may provide helpful information but also pose risks if applicant reveals her race, religion, disability, exposing employer to increased risk for a failure to hire claim.

Professional/Social Networking

- Ways to mitigate use as a “background check” tool
 - Screen in a uniform manner – both by applicants and sites searched
 - Use a non-decisionmaker to vet pages
 - Do not “friend” applicants
 - Use only legitimate, non-discriminatory reason for decision

Professional/Social Networking

- Ways to mitigate use as a “background check” tool
 - Get consent of applicant
 - Have written policies that dictate protocol
 - Train employees on policy

Professional/Social Networking

- The hidden dangers of LinkedIn and other professional networking sites
 - Glowing, inaccurate recommendation of an employee may be used against the employer in a discrimination suit
 - An employee fired for performance reasons may point to LinkedIn recommendation by his supervisor as evidence that he was performing well

Professional/Social Networking

- Trade secret and disparagement issues
 - Increased employee use of social media sites may result in publication of confidential information or public, disparaging comments about supervisors and co-workers.

A blurred background image of a classroom or lecture hall with several rows of white chairs and wooden desks. The text 'Professional/Social Networking' is overlaid in white, bold, sans-serif font, with a thin white underline beneath the word 'Networking'.

Professional/Social Networking

- Employer must make sure that existing computer use, confidential and proprietary information, and no-harassment policies specifically address social networking and advise employees that if they use the company's e-mail address or name they must act in accordance with the company's professional standards.

Policy Recommendations

- Implement Social Media/Blogging/Personal Internet Use Policies
- Train all employees on policies
- Tie-in with all other company policies
 - Current acceptable use policies may be out of date

Policy Recommendations

- Keep it personal
 - No employer-related information/sponsorship (no logos, company email, etc.)
 - Disclaimers as to personal viewpoint
- Confidential information is to be protected (Company and employee information)
- All content, use can be viewed by others, including employer
- Discipline may result
- Employees are not to have an expectation of privacy

Employee Texting

- “Textual” harassment
 - 4.1 billion text messages are sent each day in the U.S. (not all them are nice)
 - 46 states have enacted laws against cyberstalking
 - Ohio’s criminal statute - R.C. 2917.21

Employee Texting

- The law regarding what constitutes sexual harassment or other unlawful discriminatory conduct has not changed.
- The *methods* for making such inappropriate communications (texting, twittering, social networking sites) have changed.

Employee Texting

- Strategies for dealing with “textual” harassment
 - Employers must implement clear written policies that limit employee texting to matters of business necessity.
 - Some employers have chosen to ban texting.

Employee Texting

- Employers must institute procedures that enable the storage and retention of text messages from company-provided phones
 - In cases of sexual harassment, such messages constitute “electronic messages” that are considered evidence in harassment cases, and must be retained by the employer — to support or refute the charge.

Employee Texting

- Employees need to understand that inappropriate text messages are no different from inappropriate face-to-face comments.
 - Texting has the immediacy of a casual, spoken word but the permanency of an indelible document.
 - Employees understand the first. They don't understand the second
- The permanency of text messages make textual harassment cases much easier to prove than cases based upon conversations or conduct.

Employee Texting

- Texting while driving
 - Ohio does not yet ban texting while driving but Cleveland and other municipalities do
 - A statewide ban is likely to occur (22 states currently restrict, to some degree, cell phone and texting while driving)
 - Employers must amend written policies to explicitly ban work-related texting while driving.
 - Otherwise, employers may face liability if an employee causes an accident while engaging in work-related texting (already the law in California).

Employee Texting

Do employees have a right to privacy in the content of text messages from a company-provided phone?

Privacy Considerations

- Ohio law: tort of invasion of privacy established in *Housh v. Peth*, 165 Ohio St.35 (1956)
 - Used by employees to challenge an employer's search of business email accounts or monitoring of computer usage
- Federal law: public employees have a right to privacy under the 4th Amendment to the U.S. Constitution

City of Ontario, CA v. Quon

- Quon, a city employee, sued the City and a text messaging service under the Stored Communications Act and the Fourth Amendment when he learned that City managers read transcripts of his text messages as part of an overall audit on his city issued pager.

QUON

- Ninth Circuit said the City violated the Fourth Amendment and California privacy rights in spite of City policy which said that use of City pagers were limited to city business and employees had no expectation of privacy
- Problem: supervisor told employees texts would not be audited as long as employees paid overage charges and employees relied on statement

QUON

- Issue: reasonable expectation of privacy
- Supreme Court held that search of officer's text messages on city-issued pager did not violate the officer's 4th Amendment rights

FTC Endorsement Guidelines

- Federal Trade Commission enacted revised guidelines related to endorsements
- Effective December 1, 2009

FTC Guidelines

- Require bloggers to disclose any material connections between the blogger and any product or services being described in a posting
- Endorsement: “any advertising message...that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser.”

FTC Guidelines

- Example: employee blogging about employer's product.
- Employer should have policy requiring employee to disclose employment relationship
- Purpose: impacts weight and credibility of opinion

FTC Guidelines

- Ann Taylor Loft and Reverb Communications have received enforcement letters from FTC
- Recommend that any discussion by an employee discussing his or her employer's products or services on personal blogs, Facebook pages, or Twitter be accompanied by a disclosure of the employment relationship
 - Need policy and training!

FTC Guidelines

- Company-operated social media sites
 - FTC recommends that a company implement programs to train and monitor site members
 - Core elements of such programs: an explanation to members of the parameters of permissible and impermissible product claims; a reasonable monitoring program; follow-up on questionable practices

Questions?

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