



# HunterMaclean

*Legal Ingenuity*

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*Workplace Implications of Social Media*

# Roadmap

- Overview of Social Media
- Regulatory Environment
- Workplace Concerns
- Employer Liability
- Tips



# Overview

- What is Social Media?
  - Modern Day
    - Letter To The Editor
    - Statement At Public Gathering
  - But More Than That
    - Blend Of Technology And Social Interaction
    - Allowing For Creation And Exchange Of Content
      - *Instantaneously*
      - *To A Large Audience*



# Overview

- Well Known
  - Facebook, Twitter, My Space, LinkedIn, Plaxo
  - Specialized Sites Focused On Industries
  - Blogs
- Less Obvious
  - Any Site Where Someone Can Post Text / Upload Images
  - Comments On News Sites



# Move To Mobility

- Remote/Mobile Access
- Trend to Connect People Geographically Not Just Interact anonymously and “safely”
- Focus Moving From *What* You Are Doing To *Where* You Are Doing It – GPS Functionality
  - Users Check-In At Locations
  - Posts Automatically Tagged With Location

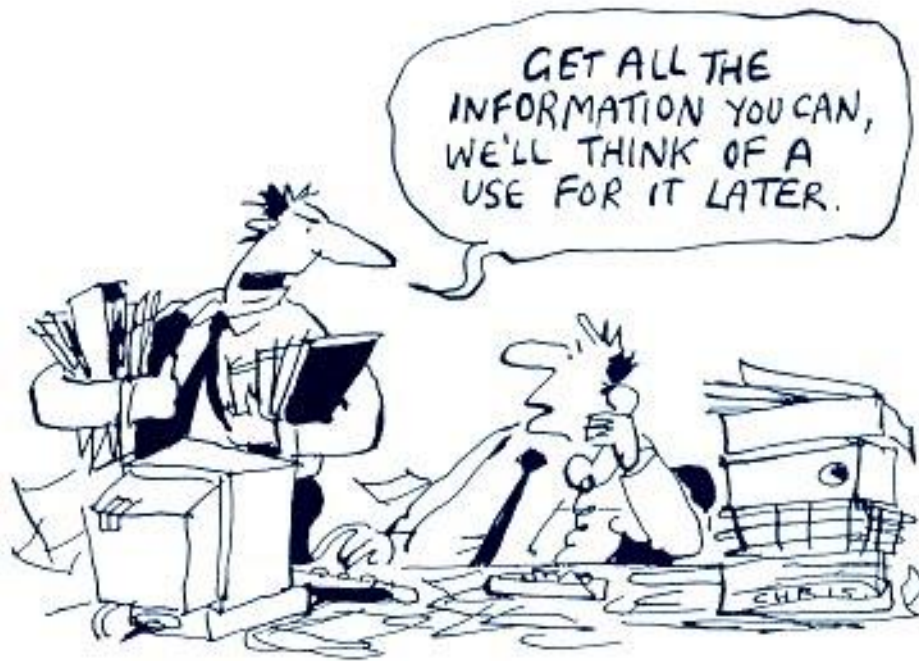


# Social Media Is Unique

- Hard To Control What Information Gets Out
  - Understand Your Facebook Privacy or LinkedIn Settings?
  - Know What Information Is Being Stored About You When You Are Online Or Using Your Cell Phone / Smart Phone?
- Impossible To Know What Is Being Collected
  - Profile Generated With Every FB Post / Tweet / Web Search / Like Button Click
    - Where You Go
    - What You Like
    - What Hours You Are Active
- Stored Somewhere And Used For Targeted Advertising



And who knows what else....



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# Still Developing

- Many Companies Have Gone Bankrupt Trying To Figure Out How To Make Money On The Internet
- Those That Have Succeeded Make Money
  - By Providing Value To Companies Willing To Pay Money For Information About Users
  - By Providing Value To Users, Often Based On Personalized Experiences
- Companies Constantly Trying New Approaches To See What Works
- Employers / Governments
  - Mining Digital Data





# Typical User

- When Exposed To New “It” Thing / Application
  - First Thought Is Typically How Will This Help Me
    - Socialize More
    - Meet New People
    - Get My Message To A Larger Audience
    - Interact With My Friends In A New And Interesting Way
  - Most Don’t Think
    - What Personal Information Will I Be Giving Away
    - Who Will Have Access To My Data
    - What Will They Do With It?
    - What Will My Employer Think?
    - Am I Reflecting Poorly On My Family, Friends Or Job?



# Typical User

- Expects That Companies Rolling Out Apps Are Ensuring Privacy Protection
  - *Wrong*
  - Personal Data Is A Goldmine For Advertisers And They Pay For It
- And Many Users Don't Care
  - After All, Isn't That The Point Of Social Media?
    - Instant / Personalized Interaction
- But What Are The Long Term Ramifications?
  - Pics Are Cool Now, But What About When I'm Interviewing For A Job?
  - Offhand Comments About A Political Candidate Or Social Movement
  - How Does This Impact My Career?



# Regulatory Environment

- No Clear Standards On Balancing Privacy With Social Media Functionality – Still Evolving
  - But The NLRB Has Been Active
  - Courts Mostly Apply Traditional Analysis
- Ad Hoc, Company Specific Policies Control
- At-Will Employment?



# Is Government The Answer?

- Is Regulation The Answer To Balancing Privacy Concerns?
  - Maybe
  - But The Govt. Wants Data Too
    - Track Criminals / Locate People
  - And Typically, The Government Builds In “Emergency” Or “National Security” Exceptions
- Or Maybe They Don’t Want Social Networking At All At Certain Times
  - Facebook / Twitter Instrumental In Middle East
  - Internet Shutdown To Try To Blunt Protests
- Think That Can’t Happen Here?
  - Joe Lieberman Proposed A Bill That Would Give The President Absolute Authority To Shut Down The Internet



# Employee Concerns - Work

- Expectations Of Privacy
  - My Computer Is Password Protected
  - My Private Life Is Mine
  - What I Do Outside Of Work Is None Of Your Business
- Employee Has General Right To Privacy And Can Show A Violation If:
  - Employer Intentionally Intruded
  - Upon The Employee's Private Matters
  - And The Intrusion Would Be Highly Offensive To A Reasonable Person
- Key Is Whether Employee Had Reasonable Expectation Of Privacy



# Employer Concerns - Work

- Lost Productivity
- Posting Sensitive Company Data
- Putting Employer In Bad Light
  - Cheerleader For The NE Patriots Posted Pictures Of Her Posing Over A Passed-Out Friend Holding A Sharpie Pen With Offensive Drawings And Words Written On Friend
  - Waitress Fired After Posting Comments About “Cheap” Customers
  - Virgin Atlantic Fired Employees Who Posted Jokes About Cockroaches On Planes & Engines Constantly Being Replaced



# Employer Concerns - Work

- Showing Legal Violations
  - Employee Fired After Posting Pictures Of Riding On Forklifts Without Safety Equipment In Identifiable Company Warehouse And While Wearing Shirt With Company Logo
- Jobs Requiring Sensitivity
  - GA Teacher Fired After Facebook Posting Showing Beer / Wine Use On Vacation And Cursing
  - Parents of Students Complained



# Employer Concerns - Work

- Showing Poor Judgment





# Employer Concerns - Work

- Showing Poor Judgment



- Also referred to students as “germ bags” and parents as “snobby” and “arrogant”



# Employer Concerns - Work

- Employer Liability
  - Employer Can Be Liable For Acts Of Employees
  - Employer Can Be “Put On Notice” By Employee Postings
    - Harassment
    - Discrimination
    - Safety Violations



# Hostile Work Environment / Discrimination

- Discriminatory Statements, Racial Slurs, Or Sexual Innuendos Directed At Co-Workers
  - “Can’t Wait To Meet The New Hottie In Purchasing”
  - Supervisor Posted “I’m Tired Of Picking Up The Slack For All The Women In The Warehouse”
- Or, Employee Files Harassment Suit After Supervisor Repeatedly Tries To “Friend” Her On Facebook



# Negligent Hiring, Retention & Supervision

- Employers Have A Duty To Maintain A Safe Workplace
  - Duty To Take Reasonable Care In Selecting Employees
  - Breach If Employer Knew Or Should Have Known Employee Was Dangerous
- Hard For Employers To Keep Head In Sand
  - What If Multiple Concerning Postings On Social Media Sites Easily Discoverable By Google Search
  - Thus They Search The Internet



# Defamation

- Defamation
  - A false and malicious defamation of another, expressed in print, writing, pictures, or signs
  - Tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule
- Other Companies See Employee Posts And Are Concerned And Stop Doing Business Or Extending Credit
- Disseminate Rumors / Gossip / False Statements About Co-Workers / Customers
  - Employer Is Always Sued Along With Person Making Statement



# Privacy

- Privacy
  - Disseminate Information About Employees / Customers
  - “Glad My Buddy Joe’s Cancer Is In Remission”
    - Disclosure Of Private Information
  - Employee Responding To Customer Compliment --  
“Thanks For The Kind Words -- Have Fun On Vacation!”
    - House Is Robbed



# Protecting Company Secrets

- Proprietary Information Is What Makes The Company Valuable
  - Blog Discussion Of Technique / Materials
  - “Prototype Looks Good!”
  - “Been Working 24/7, No Way We Are Going To Make Launch Date”
- Investors Make Decisions
  - What About Misleading Postings?



# NLRB Regulation of Social Media

- NLRA Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain or coerce” employees in the exercise of “Section 7” rights.
- Employee rights under Section 7 include rights to engage in “concerted activities” for the purpose of “mutual aid or protection.” “Concerted activity” is action taken “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”
- NLRB says that employer maintenance of work rules which “unreasonably tend to chill employees” in the exercise of their Section 7 rights will violate Section 8(a)(1).





# NLRB Regulation of Social Media

- The Board's General Counsel has issued three “reports” on cases exploring the parameters of permissible employer policies and practices in this area
  - Report of Acting General Counsel concerning social media cases, OM 11-74 (Aug. 18, 2011)
  - Report of Acting General Counsel concerning social media cases, OM 12-31 (Jan. 24, 2012)
  - Report of Acting General Counsel concerning social media cases, OM 12-59 (May 30, 2012)



# NLRB Regulation of Social Media

- Reports do not have force of law, but they demonstrate the NLRB's General Counsel's approach
- NLRB jurisdiction covers virtually all private sector employers, whether unionized or not.
- Employee complaints: Protected concerted activity, or individual gripes?
- Scope of Concern: Any employer policies which can be violated via social media.



# NLRB Regulation of Social Media

- Policy violates Act if it would
  - Explicitly restrict Section 7 rights
  - Employee would reasonably construe the policy language to prohibit protected concerted activity
  - The policy was drafted in response to protected concerted activity
  - The policy was applied to restrict the exercise of protected concerted activity
- Reports cite following factors to determine whether social media posts are “concerted activity”
  - Whether the employee discussed the posts with co-workers
  - Whether any co-workers responded to the posts



# NLRB Regulation of Social Media

- Whether the social media activity was an outgrowth of employees' collective concerns
- Whether the employee was seeking to induce or prepare for group action
- Whether the employees met or organized any group action to raise the employer's awareness of the issues in dispute
- Not an exhaustive list
- Demonstrates the fact-specific inquiry – *there are no bright-line rules*



# NLRB Regulation of Social Media

- Example Of Policies That Violated Act
  - Prohibition on any communication that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, or staff member, or that might damage the reputation of the hospital or its staff;
  - Prohibition on talking about company business on personal accounts, and from posting anything that an employee would not want a manager or supervisor to see or that would put his or her job in jeopardy;
- Overbroad because would commonly apply to discussions or criticism's of employer's labor practices or treatment of employees.



# NLRB Regulation of Social Media

- Example Of Policies That Violated Act
  - A prohibition on revealing personal information regarding coworkers, company clients, partners or customers without their consent.
- Overbroad because employees have the right to discuss their wages and other terms and conditions of employment.



# NLRB Regulation of Social Media

- *JT's Porch Saloon & Eatery* (July 7, 2011)
  - Bartender complained about pay and tip-pooling policy in response to sister's question on Facebook about work. Also called customers “rednecks” and stated that he hoped they would choke on glass as they drove home drunk.
  - Employee fired.
  - No violation. While concerned terms and conditions of employment, comments were not:
    - Part of a concerted effort
    - Not part of other comments by other employees
    - Not part of an attempt to initiate group action



# NLRB Regulation of Social Media

- *Wal-Mart* (July 19, 2011)
  - Employee posted comments critical of management's treatment of employees.
  - Other employees responded with supportive comments like “hang in there”
  - Employee disciplined.
  - No violation. Despite supportive comments, there was no discussion of group action among employees.





# Who Wins?

- Employer Generally Wins – For Now & With The Right Policies
  - At-Will Employment: Employer Or Employee Can End Employment Relationship At Any Time For Any Reason, With Or Without Cause That Is Not Protected By Law
- Around 10% Of US Companies Have Fired Employees For Misuse Of Social Media
- NLRB Is Wild Card



# What Are Employer's Doing

- Balancing Concerns
  - Show Reasonableness
  - Show Legitimate Business Interests
- Adopting Policies To Remove Any Expectation Of Privacy
  - “We Will Monitor Usage Of Our Software And Equipment”
  - What About Monitoring Activity Outside Of Work?
- Adopting Internet Usage Policies
- Adopting Social Media Policies
  - Outlining What Can And Cannot Be Said On Social Media Sites



# Compliant Social Media Policy

- Typically Define Professional and Personal Involvement
- Professional Involvement
  - Portray the values of the Company
  - Accurately represent themselves
  - Be transparent – clearly state goals of participation
  - Maintain consistency with the Company's brand
  - Consider the public nature and longevity of comments before posting
  - Maintain civility
  - Be honest
  - Protect confidential information and relationships



# Compliant Social Media Policy

- Personal Involvement
  - Avoid the appearance of representing the Company.
  - Not use the Company's name, logo, or other marks, images or other property on personal sites
  - Not use the Company's name to promote or endorse any product, cause, religion, political party, candidate or anything else on personal sites
  - Keep clear lines between personal and professional social networking activities
  - Remember that personal information can be used in identity theft, which can compromise Company security, as well as employees' own security
- Violations Of Policy = Termination
  - Employer needs to be careful about *taking action* based on employee complaints



# What To Watch For

- Government Attempt To Standardize Privacy Requirements
  - Fox Guarding The Henhouse?
  - Continued NLRB Involvement
- Companies Continue To Push The Limits
  - How On-Line Activity Is Used
  - How On-Line Activity Is Monitored
  - Lawsuits
  - PR Backlash

