EMPLOYMENT PRACTICES LIABILITY CONSULTANT

Whistle (and Tweet) While You Work: Social Media, Networking, and What's Not Working in the Workplace

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Given the ubiquity of social media, virtually all businesses must now be prepared to deal with the potential legal and employment-related liabilities social media create.

This article begins by examining the recent, meteoric growth and current scope of both personal and workplace social media use. It continues by analyzing several rulings by the National Labor Relations Board (NLRB), especially those concerning the legal protections available to employees who use social media. The piece goes on to discuss the use of social media to screen job candidates, controversies regarding the ownership of employee-created social media, employee blogs, social media-based defamation by disgruntled employees, and the corresponding exposure of businesses to a variety of legal perils. The article continues with a discussion of the threats posed by workplace-based cyber bullying and concludes by providing a set of action steps that can vastly reduce a company's susceptibility to the legal pitfalls associated with employee use of social media.

9 to 5: Growth of Social Media in the Workplace

Social media include websites like Facebook, LinkedIn, Twitter, Snapchat, Instagram, Yelp, Pinterest, Glassdoor, YouTube, and many others. Social media use is no longer a phenomenon occurring only among millennials but is rather continuing to become more prevalent for all generations. According to a Pew Research Center study, 69 percent of adults in the United States use at least one social media site (as of November 6, 2016; Pew Research Center, January 12, 2017, "Social Media Fact Sheet"). When you break down social media use by age, it is clear that social media usage by all generations is on the rise, as depicted in the table on the next page. *Id.*

Percentage of Individuals Who Use Social Media by Age

	December 8, 2005	December 4, 2008	August 26, 2011	January 26, 2014	November 6, 2016
Age 18–29	16%	67%	82%	84%	86%
Age 30–49	9%	30%	59%	77%	80%
Age 50–64	5%	12%	36%	52%	64%
Age 65+	2%	2%	12%	27%	34%

Social media are becoming more popular across all age ranges, and this trend is expected to continue.

Why do employees use social media at work? While some use of social media in the workplace is work related, we know that a number of employees use social media at work for personal reasons. A 2016 survey about the use of social media at work found the following.

- Thirty-four percent use social media to take a mental break from their job.
- Twenty-seven percent use social media to connect with friends and family.
- Twenty-four percent use social media to make or support professional connections.
- Twenty percent use social media to obtain information that helps them solve problems at work.
- Seventeen percent use social media to build or strengthen personal relationships with coworkers.
- Seventeen percent use social media to learn about someone with whom they work.
- Twelve percent use social media to ask work-related questions of people *outside* their organization.
- Twelve percent use social media to ask such questions of people *inside* their organization.

Pew Research Center, June 22, 2016, "Social Media in the Workplace."

Interestingly, the study found that fewer employees used social media at work for personal reasons when their employer had a social media policy. *Id.* For example, 30 percent of workers whose companies have an at-work social media policy say they use social media while on the job to take a break from work, compared with 40 percent of workers whose employers do not have such policies. *Id.* Moreover, 20 percent of workers whose employers have at-work social media policies say they use social media to stay connected to family and friends while on the job, compared with 35 percent of workers whose social media use is not regulated at work. *Id.* If your company does not have a social media policy already, I encourage you to read "Requirements for Corporate Social Media Policies" from the Fall 2011 issue of *Employment Practices Liability Consultant,* which discusses how to draft a social media policy in detail.

A Hard Day's Night: New Guidance from the NLRB Regarding Corporate Social Media Policies

New decisions from the NLRB show that employers must be cautious about infringing upon the rights of their employees by attempting to regulate the use of social media in the workplace. Sections 7 and 8 of the National Labor Relations Act protect the right of employees to engage in concerted activities without interference from the employer.

- Section 7: "Employees have the right … to engage in other concerted activities for

the purposes of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

- Section 8: Employers cannot "interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." 29 U.S.C. § 158.

Durham School Services

Moreover, the NLRB has determined that "concerted activity" includes complaints about wages, hours, and working conditions. A company may not broadly restrict an employee's ability to discuss his or her employer, including the exclusion of disparaging comments. In *Durham Sch. Servs.,* 360 NLRB No. 85 (2014), the NLRB evaluated Durham School Services' "Social Networking Policy." Below are portions of the social media policy evaluated by the NLRB, along with the NLRB's assessment of the respective sections.

- **Social Networking Websites:** "It is also recommended that the employees … limit contact with parents or school officials, and keep all contact appropriate. Inappropriate communication with students, parents, or school representatives will be grounds for immediate dismissal."
- **Interaction with Coworkers:** "… communication with coworkers should be kept professional and respectful, even outside of work hours."
- **Expectations of Privacy:** "Employees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers should not have any expectation of privacy, and may be subject to investigation and possibly discipline."

The NLRB found that this policy was overbroad and could be construed as limiting Section 7 activity. Generally, to determine whether a policy is objectionable, one must consider whether the policy "would reasonably tend to chill employees in the exercise of their Section 7 rights." If a policy is likely to have a chilling effect on Section 7 rights, then "maintenance of that policy is an unfair labor practice, even absent evidence of enforcement." It is important to examine the language of social media policies closely to determine whether the policy is overbroad or can be construed as chilling the right of employees to "engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."

Employers need to ensure that their social media policies are narrowly tailored and do not bar discussion about wages, hours, or other working conditions. Generally, blanket policies that completely prohibit certain activities are likely to be considered overbroad. For instance, social media policies should not

- prohibit all use of the company's logos, trademarks, or copyrights;
- completely prohibit employees from taking photographs and making recordings during work hours;
- prohibit employees from walking off the job, which reasonably would be read to include protected strikes and walkouts; or
- prohibit employees from engaging in any action that "is not in the best interest of the employer."

Triple Play Sports Bar & Grill

Employers also should not interfere with an employee's right to discuss and criticize working conditions, even if an employee is off duty. In *Triple Play Sports Bar & Grill,* 361 NLRB No. 31 (2014), a former employee made the following post on social media: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do tax paperwork correctly!!! Now I OWE money … Wtf!!!!" A current employee "liked" the post, and a second employee commented, "I owe too. Such an a**hole." The employees were discharged as a result of their comments.

The company's Internet & Blogging policy read: "The Company supports the free exchange of information and supports camaraderie among its employees. However, when Internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or **engaging in inappropriate discussions about the company, management, and/or co-workers,** the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect."

The NLRB found this policy to be unlawfully overbroad because "employees would reasonably interpret it to encompass protected activities." The policy prohibited "engaging in inappropriate discussions about the company, management, and/or co-workers," and this can be construed as interfering with an employee's right to comment on conditions of employment because the employer could consider these discussions "inappropriate."

The NLRB easily determined that the subject matter of the social media post noted above suggested that it qualified for protection: the employer's calculation of employee tax withholdings clearly pertained to wages and working conditions. Next, the NLRB analyzed whether the employees' actions constituted "disloyal criticism," such that the employees forfeited their right to protection. The decision held that off-duty social media exchanges *can* lose NLRA protection if they either (1) amount to disloyal criticism disconnected from any ongoing labor dispute or (2) are made with "knowledge of their falsity or with reckless disregard of whether they are true or false." The NLRB concluded that the comment and "like" of the employees did not lose the protection under this standard. The NLRB reasoned that "[t]he comments at issue did not mention [the employer's] products or services, much less disparage them" but rather related to an ongoing labor dispute. Additionally, the discussions were not "directed to the general public" because they occurred on a personal Facebook profile rather than a more public social media venue, such as a company Facebook page. Moreover, no supervisor or member of management participated in the discussion. The NLRB stated that, regardless of an employee's privacy settings and irrespective of who could view the employee's Facebook page, such a discussion was directed at the public, and compared the digital discussion to one that a customer or third party could overhear. Under this interpretation, it is likely that anything less than criticism on social media specifically directed to the general public would be sufficiently private to maintain protection. The decision was later upheld by the Second Circuit.

Pier Sixty

Employers should be cautious of discharging an employee because of his or her activity on social media. In *Pier Sixty,* 362 NLRB No. 59 (2015), an employee posted this status during a break at work: "[The Assistant Director] is such a NASTY MOTHER F***KER don't know how to talk to people!!!!!! F**K his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" The employee was discharged for violating the company's "Other Forms of Harassment Policy."

The NLRB concluded that the employee was unlawfully terminated as a result of his speech on social media. The employee's speech regarding his support of unionization on his personal Facebook page was protected concerted activity despite the vulgar language. The NLRB reasoned that this language was common in the workplace among employees and supervisors alike, and no one had previously been discharged for using similar language. Thus, the vulgarity of the language alone was not sufficient to render the conduct

unprotected. Additionally, the NLRB did not find that the employee's statement violated the company's policy. The "Other Forms of Harassment policy" prohibited harassment "on the basis of age, race, religion, color, national origin, citizenship, disability, marital status, familial status, sexual orientation, alienage, liability for services in the U.S. Armed Forces, or any other classification protected by Federal, State or Local laws" and provided the following examples of harassment: "unwelcome slurs, threats, derogatory comments or gestures, joking, teasing, or other similar verbal, written or physical conduct directed towards an individual because of one of these protected classifications." The NLRB reasoned that this policy did not prohibit vulgar language, the employer did not allege that the employee's comments were directed at a protected class, and the employer had not previously discharged any employee for using vulgar language. The Second Circuit recently affirmed the NLRB's decision.

The takeaway from these decisions: prudent employers should seek legal counsel to help craft an enforceable social media policy and to consider the ramifications of discharging an employee for posting on social media.

Just Can't Get Enough: Using Social Media To Vet Job Candidates

More than ever, employers are utilizing social media searches to obtain additional information—some of which may not lawfully be discussed during a job interview. According to a 2016 CareerBuilder study, 60 percent of employers use social networking sites to research job candidates (*Number of Employers Passing on Applicants Due to Social Media Posts Continues to Rise, According to New CareerBuilder Survey;* June 26, 2014). In fact, employers are not limiting themselves to social networks: 45 percent of employers use search engines to research job candidates with 20 percent stating they do so frequently or always. *Id.*

Fifty-one percent of those hiring managers surveyed found something on social media that caused him/her not to hire the candidate. Most common reasons to pass on a candidate included the following.

- Provocative or inappropriate photographs or information (46 percent)
- Drinking or using drugs (41 percent)
- Bad-mouthed previous company or coworker (36 percent)
- Poor communication skills (32 percent)
- Discriminatory comments (28 percent)
- Lied about qualifications (25 percent)
- Shared confidential information from previous employer (24 percent)
- Linked to criminal behavior (22 percent)
- Screen name was unprofessional (21 percent)
- Lied about an absence (13 percent)

One-third of employers found content that made them *more* likely to hire a candidate. Some of the most common reasons employers hired a candidate based on their social networking presence included the following.

- Good feel for personality (46 percent)
- Background information supported qualifications (45 percent)
- Professional image (43 percent)
- Well-rounded (40 percent)
- Creative (36 percent)
- Awards and accolades (31 percent)
- Great references (30 percent)
- Interacted with company's social media (24 percent)
- Large amount of followers or subscribers (14 percent)

However, employers may want to refrain from looking at job candidates' social media presence. Social networking sites may provide employers with information that they cannot

and should not use in making hiring decisions and that may otherwise not have been acquired. For instance, an employer may learn that a job candidate is a member of a class protected by federal and/or state law, and such information, once known, cannot be "unlearned." One option to mitigate the risk of unlawful bias in hiring decisions (based on such information), is to assign this task to a third party with instructions to screen out material about a candidate's membership in a protected class before providing this information to the person(s) making the hiring decision.

Employers must balance the risks and benefits of information available on social media during the hiring process. To help avoid exposure, employers should make hiring decisions based on *who* the person is, not *what* the person is, by focusing on education, experience, talent, ambition, and other similar factors.

Takin' Care of Business: Who Owns Your Company's Social Media?

A California company made headlines when it sued a former employee over 17,000 Twitter followers. The employee amassed over 17,000 new Twitter followers while working in social media and marketing for the company. In this case, the Twitter handle included both the name of the Company and the name of the employee, and ownership of the Twitter followers was unclear. Since the case settled out of court, there is still no clear law or jurisprudence regarding ownership of Twitter followers.

To avoid these issues, ownership of Twitter handles, followers, and social media content should be discussed with employees in advance and reduced to writing. Clear communication at the start of the employer-employee relationship can prevent controversies and potential litigation down the road. The same is true for company Facebook pages and Facebook friends. If a marketing employee's duties include posting to social media on behalf of the company, then policies and procedures about ownership and the transfer of social media accounts upon separation from employment are critical. Social media accounts should be set up by the company, and then the company can provide employees with the usernames and passwords. Giving more than one employee access to the usernames and passwords is important in the event of an unexpected absence or if an employee leaves the company on bad terms. As a general rule, the creator of content owns that content, but an employer can consider requiring employees to contractually assign the ownership of content created in the course and scope of their employment by the company. Additional policies and procedures regarding content of posts and approval of posts may also be helpful to avoid inappropriate posts on behalf of the company.

More employees than ever have their own LinkedIn profiles, and many employers encourage employees to develop business relationships on LinkedIn. As a result, employees are likely to initiate numerous connections with coworkers, clients, potential clients, and vendors during their employment. At least one court has found that LinkedIn connections are essentially customer lists, and they may be classified as trade secrets. Employers should consider protecting their proprietary information by requiring employees to make their connection list "private" as a means of maintaining the confidentiality of this proprietary information. Employers should also ensure that their confidentiality, non-solicitation, and/or non-competition agreements are enforceable as a way of prohibiting, to the fullest extent possible under the law of your jurisdiction, a former employee from plundering clients.

Working Girl: Employee Blogs and Their Potential Impact

Blogs and Vlogs (or video blogs) are increasingly popular, and, more likely than not, your employees create them. These social media posts can "go viral," and the impact of these posts can be enormous. Uber illustrates this point well. On February 19, 2017, Susan

Fowler Rigetti, a former engineer for the company, wrote an explosive blog post highlighting the alleged sexual harassment she experienced during her employment at Uber. She wrote that, when she reported that her manager was sexually harassing her and propositioning her, human resources did not act on her complaint because her manager was a "high performer." Her blog post went viral. These allegations were televised by national news outlets and discussed by employees around water coolers across the country. A movement on Twitter to encourage consumers to stop using Uber, using #DeleteUber, was renewed.

On February 21, 2017, Uber hired former US Attorney General Eric Holder to review the former employee's allegations and investigate the company's corporate culture. On February 24, 2017, a second former Uber employee blogged anonymously about a manager she described as sexist and casually racist. On March 3, 2017, another former engineer for Uber named Keala Lusk published a blog post complaining of sexism at the company. Shortly thereafter, Uber executives began leaving the company, and on June 6, 2017, Uber discharged 20 employees due to complaints of sexual harassment, bullying, and unprofessional conduct.

Just 4 months after a woman's complaint of sexual harassment at Uber was published on her blog, Uber CEO Travis Kalanick resigned. While there were other factors at play in Mr. Kalanick's resignation, this should serve as a cautionary tale for all employers. Uber is a privately held company, but these allegations and other public relations issues may have reduced the company's value by $10 billion dollars (Balakrishnan, Anita, CNBC, April 25, 2017, "Scandals may have knocked $10 billion off Uber's value, a report says"). The rise of social media provides a platform to any employee to potentially harm his or her employer's business through negative publicity and public outcry.

Take this Job and Shove It: Disgruntled Employees and Defamation

As discussed *supra,* social media provide disgruntled employees with a platform to tell the world their story. For instance, Yelp permits customers to review restaurants and businesses; Glassdoor, Indeed, Great Place to Work, Vault, Fairy God Boss, and other websites encourage employees to write honest reviews about their current and former employers for the benefit of job applicants. Such reviews may also include information about compensation, benefits, and training provided by the employer. For employers, these websites are a double-edged sword: good reviews help attract good job applicants, and bad reviews could dissuade a great candidate from pursuing a position with the employer. Reviews can also be viewed as helpful, constructive criticism to alert employers about potential areas in which the company could improve.

Some employers have attempted to prohibit all employees from posting, commenting, or blogging anonymously in an effort to minimize the number of bad reviews. This is not recommended. In a case involving a Wendy's restaurant policy prohibiting employees from e-mailing, posting, commenting, or blogging anonymously, the NLRB found that "requiring employees to publicly self-identify in order to participate in protected activity imposes an unwarranted burden on Section 7 rights." Given this finding, the rule banning anonymous posts was determined to be unlawfully overbroad.

Just as some business owners have sued customers who posted critical reviews on Yelp, a number of employers are now suing employees over critical reviews. These lawsuits typically allege defamation against the employee who wrote the review. Yet, because employees have a right to share their opinions and discuss working conditions pursuant to the NLRA, it is difficult for an employer to prevail in such litigation. In a defamation

claim, the employer has the burden to prove that an employee's statement is false and that the statement is a verifiable fact (rather than an opinion). Even if a review may be defamatory, the employer should consider whether filing a lawsuit will do more harm than good by highlighting the negative review and attracting further unwanted attention.

What can employers do to fight back against negative reviews and defend themselves? Employers typically have the option to respond to negative reviews directly on the website on which they are found. The employer's comments can be viewed by anyone who looks at the employee's review, which provides an opportunity for an employer to share its side of the story.

Mean: Cyber Bullying in the Workplace

A study conducted by Dr. Judy Blando concluded that almost 75 percent of employees surveyed had been affected by workplace bullying, either as a target or a witness (Christine Comaford, August 27, 2016, *Forbes,* "75% Of Workers Are Affected By Bullying—Here's What To Do About It"). The Workplace Bullying Institute defines workplace bullying as "repeated mistreatment; abusive conduct that is: threatening, humiliating, or intimidating, work sabotage, or verbal abuse" (Workplace Bullying Institute, February 2014, "2014 WBI U.S. Workplace Bullying Survey"). This can include yelling, threats, spreading rumors, sabotage, exclusion, and micromanagement. Social media have even enabled workplace bullies to harass coworkers on social media *after* work hours. Cyber bullying that occurs off the worksite and/or after work hours can still have a damaging impact on the workplace.

In a real-world example, an employee with a disability reported his coworker's misconduct. In retaliation, another coworker started a personal blog where employees posted derogatory comments about the "Rat," the disabled coworker. The disabled employee was born with a disfigured hand, and his coworkers referred to his hand as "the claw." A blogger offered to pay $100 to anyone who took a photograph of "the claw." The disabled employee reported the social media posts to his supervisor, but the company took little action to stop the cyber bullying. When the employee sued his employer, the employer was found liable for having knowledge of the harassment and failing to take remedial action to stop the harassment in *Espinoza v. County of Orange,* 2012 Cal. App. Unpub. LEXIS 1022 (Feb. 9, 2012).

While the target of cyber bullying in the *Espinoza* case was legally protected as an individual with a disability, workplace bullying is not always illegal. This is because employees may be bullied for characteristics not protected under state or federal law. Although employers may not be legally required to combat workplace bullying, they may want to address the issue nevertheless. Bullying is often ignored by employers as a personality conflict, and this failure to take action can have a detrimental effect on the workplace. Bullying can have a negative impact on employee morale, company culture, productivity, absenteeism, health insurance costs, and employee turnover rates.

Several states are considering healthy workplace or anti-bullying legislation, and this trend is likely to continue across the country. California now requires mandatory sexual harassment training for supervisors to include a discussion of bullying. It is likely that many legislatures will pass laws to reduce bullying and cyber bullying. In fact, advocacy groups have proposed creating a new cause of action to empower employees to file a lawsuit against a bully, creating a mechanism for injunctive relief and an enforcement mechanism comparable to employment discrimination laws by expanding harassment to include all abusive bullying. If an employer wants to be proactive and counteract bullying in the workplace, developing a strong anti-bullying policy and training supervisors about bullying would be strong first steps.

Closing Time: How You Can Take Action Today

1. If you don't already have a social media policy, now is as good a time as any to draft one to help protect your company. If you already have one, then it is important to update it regularly based on the new guidance received by the NLRB and any applicable jurisprudence from your state(s) of operation(s).

2. If your company researches job candidates on social media, make hiring decisions based on *who* the person is, not *what* the person is, by focusing on education, experience, talent, ambition, and other similar factors. Consider using a third party to research this information in order to screen hiring decision-makers from obtaining sensitive information about job candidates that should not be considered in the hiring process.

3. If your company does not have policies and procedures regarding the ownership of social media accounts and content, create them. There should be clear guidelines about what content is appropriate and the process for approval of posts.

4. Review your confidentiality, non-solicitation, and/or non-competition agreements to see if they are enforceable in your jurisdiction. Consider whether modifications are required to address LinkedIn connections and the confidentiality of customer lists.

5. Are there policies and procedures in place to report, investigate, and respond to workplace bullying? Consider whether the company should provide anti-bullying training.

6. If an employee makes a complaint about a grievance to a supervisor or Human Resources, listen and take the complaint seriously. Because social media provide a platform to all disgruntled employees, assume your response to a complaint will be published on the front page of a newspaper. Generally, when a company assumes its response will be publicized, it will take more care to ensure the response is thoughtful, measured, and reasonable.

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