WE’RE NOT ON FACEBOOK ANYMORE, DOROTHY: NAVIGATING THE LATEST LEGAL ISSUES WITH EMPLOYEE USE OF SOCIAL MEDIA

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SOCIAL MEDIA ROADMAP

- Prevalence of social media
- Cyber screening
- Employee monitoring
- Social media misconduct
- Policies
- Social media posts in litigation
PREVALENCE OF SOCIAL MEDIA

Social Media Explained

- Foursquare
  I’m at the donut shop – again!

- Instagram
  Here is a vintage picture of a donut

- Pinterest
  My donut recipe

- Facebook
  I like donuts

- Twitter
  Hey! I am eating a donut

- Lost.fm
  Listening to ‘Donuts’

- YouTube
  This is how you eat a donut

- Hotmail
  Click for the secret to stop overeating donuts

- Google+
  I’m a Google employee and I like Donuts

- Vine
  Funny donut eating videos

- LinkedIn
  I want to work at a donut shop

- Snapchat
  Saw the donut? It’s gone

- Soundcloud
  The sounds of eating a Donut

- Skype
  Call me from the donut shop

- Wikipedia
  Who invented the donut?

- Flickr
  My donut photo collection

- Quora
  Is it Donut or Doughnut?

- Meetup
  Join us for Donut Tuesdays!
PREVALENCE OF SOCIAL MEDIA

By the Numbers

- 69% of U.S. adults are Facebook users, and 3/4 of those users access Facebook on a daily basis
  - 2 billion+ monthly active users
- Some Facebook users have taken steps to moderate their use of the site, such as deleting the Facebook app from their phone or taking a break from the platform but despite this, Facebook users as a whole are just as active on the site as they were in 2018
- 37% of U.S. adults use Instagram
  - Increase of 9% from 2016
PREVALENCE OF SOCIAL MEDIA

Employer Concerns

- Productivity
- Data/network security
- Reputation
- Trade secrets
- Confidentiality
- Harassment
- Privacy
- More
Forget the resume, son. Let's just take a look at what you have posted on your facebook instead.
CYBER SCREENING

Can employers legally request social media log-in/account information of Employees/Applicants?

- 25+ states prohibit

- Some go beyond hiring; include public information, or information for an investigation

- National level legislation

- Could reveal access to protected characteristics of candidates

- Is it really a good idea?
CYBER SCREENING

Recruiting and Hiring

- Goals of hiring:
  - Identification/retention of quality employees
  - Avoid getting more than you bargained for
  - Avoid negligent hiring

- Do searches assist in pursuit of those goals?
CYBER SCREENING

Recruiting and Hiring (cont.)

- Employers suffer $4 billion in annual embezzlement losses
- Average workplace violence award is more than $1 million
- SHRM: More than 50% of resumes contain one material fabrication
- Can you afford **NOT** to screen?
The law surrounding recruiting employees through social media is active and in flux.

Recently settled class actions against major companies, such as Amazon and T-Mobile, alleged age discrimination due to the targeting of Facebook job ads towards younger workers.
Have you ever rejected a candidate because of what you saw about them on a social networking site?

- Yes: 69%
- No: 26%
- I don’t use those sites to screen prospective employees: 5%

Why have you rejected those candidates?

- Posted inappropriate photos: 11%
- Posted inappropriate comments: 11%
- Posted content about them drinking: 9%
- Posted content about them using drugs: 10%
- Posted negative comments about a previous employer: 11%
- Demonstrated poor communication skills: 11%
- Made discriminatory comments: 10%
- Lied about their qualifications: 13%
- Shared confidential information from a previous employer: 7%
- Never rejected a candidate because of information on a social networking site: 7%
CYBER SCREENING

Third-Party Screening

- Isolate protected characteristics (age, race, religion, etc.)
- Relation to job qualifications
- Consistency (sources, info, reasons, etc.)
- Do you homework on third-party providers
- Must comply with federal Fair Credit Reporting Action (FRCA)
EMPLOYEE MONITORING
EMPLOYEE MONITORING

Should you monitor?

- Time and resource intensive
- Will you really learn anything important?
- Negligent hiring/retention considerations
- Remember: Social media = widespread and rapid information dissemination
EMPLOYEE MONITORING

Stored Communication Act (18 U.S.C. 2701)

- Prohibits intentional, unauthorized access to electronic stored communications
- Includes exceeding authorized access
- Applies in most instances notwithstanding BYOD policies
EMPLOYEE MONITORING

Stored Communication Act (cont.)


- Covers access to social media account used by employee for employer benefit (*Maremont v. Susan Fredman Design*, N.D. Ill. 2014)

- Covers personal webmail account access, even from company device, while e-mails stored on employer server (*Lazette v. Verizon Wireless*, N.D. Ohio 2013)
EMPLOYEE MONITORING

If you are going to monitor…

1) Establishing formal process
2) Designate responsibility for process
3) Describe activities to be undertaken
4) Set up authorization/approval
5) Arrange for secure storage
6) Don’t go too far

“Friending” of employees by managers increases likelihood of employment claims and “mandatory friending” is prohibited by 15 states.
ONLINE MISCONDUCT

Employees don’t really air out their employment gripes online, do they?
ONLINE MISCONDUCT


10:31 AM - 21 May 2014
ONLINE MISCONDUCT

Next time you tip me $5 on a $138 bill, don't even bother coming in cause I'll spit in your food and then in your face you cheap !!!!!!!! — with and 2 others.

I actually contemplated quitting my job today … oh wait I do that everyday.
ONLINE MISCONDUCT

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

1 Like 1 Comment

Hi [Name], i guess you forgot about adding me on here? ...Firstly, don't flatter yourself. Secondly, you've worked here about 5 months and you 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.
ONLINE MISCONDUCT

My boss is a complete idiot. The company I work for is ridiculous. Truly. I can't even articulate the lack of professionalism & organization.

I love when I can hear my boss talking on the phone at work. As long as I can hear her on the phone, I know it means she is not going to sneak up behind me and see how many web browsers I currently have open.

I love when my employees post things like this on Facebook. I'll need to see you in my office at 4. - Your boss.
ONLINE MISCONDUCT

Investigating

- Proliferation of technology makes it effortless to take a photo or video of work conditions, conduct, injuries, confidential information, etc. and not just share it with the world in a few taps

- See for yourself! Search #worksucks or #ihatemyjob on Instagram/twitter
ONLINE MISCONDUCT

Investigating

1) Act promptly, not rashly
2) Gather all relevant information
3) Assess the content objectively
4) Speak with the poster
5) Interview other relevant witnesses
6) Communicate any determination
7) Document your steps
ONLINE MISCONDUCT

National Labor Relations Act

- **Section 7**: Right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for collective bargaining or mutual aid/protection

- **Section 8**: No interference, restraint or coercion of employees exercising rights
ONLINE MISCONDUCT

National Labor Relations Act (cont.)

- Plain English: Employees can discuss their wages, hours, and terms and conditions of employment with each other for their possible mutual benefit
- Applies to both union and non-union Employers
- In cyberspace and social media, not just the water cooler
ONLINE MISCONDUCT

Hypotheticals

SOME DAYS I BE AT WORK LIKE

IDGAF... FIRE ME
ONLINE MISCONDUCT: HYPO NO. 1

- Employee who is upset about a co-worker’s promotion complains on Facebook, while at work, that she hasn’t gotten a raise in three years

- A few of the ‘Facebook friends’ she works with respond, while at work, by complaining about mismanagement

- Can the original complainer be lawfully disciplined? How about the ‘Facebook friends’?
ONLINE MISCONDUCT: HYPO NO. 2

- Male manager yelled at employee and took arm to escort off of shop floor for failure to wear safety goggles

- That night, at home, employee posts: “Today, a man put his hands on me. . . I would [have] sliced his throat open if it didn’t happen at work. And had no remorse.”

- Can employee be disciplined? Does the post being published outside of work impact the analysis?
ONLINE MISCONDUCT

Factors to consider before discipline:

1) Was the subject matter wages, hours, or other terms/conditions of employment?

2) Who viewed/liked/commented on the post, and were they co-workers/family/others?

3) Viewed in context, was it intended to incite group activity, or merely a personal gripe?

4) Were responses just for emotional support?

5) If the post was not published while employee was at work, was post sufficiently connected to work?
SOCIAL MEDIA POLICIES
POLICIES

Primary Workplace Policies Implicated:

- Electronic communications
- Anti-harassment
- Retaliation
- Social media
- More
POLICIES

Social Media Policy Benefits:

1) Better managerial control
2) Protection of company name/info
3) Maximize productivity
4) Control employer technology
5) Avoid harassment/other liability
POLICIES

NLRB Scrutiny – *Quicken Loans v. NLRB* (D.C. Cir, 7/29/16):

“You will not publicly criticize, ridicule, disparage or defame the Company ... with or through any written or oral statement or image (including, but not limited to statements made via websites, blogs, postings to the internet ... )”
POLICIES

NLRB Scrutiny (cont.)

- Standard until December 2017: Does it directly interfere with, was it enforced to interfere with, or can it be “reasonably construed” as limiting protected activity under the NLRA?


- This same standard under Act applied for all social media work rules and policies
POLICIES

NLRB Scrutiny – *The Boeing Co.*, 365 NLRB No. 154 (2017):

- Overruled *Lutheran*

- Established “Reasonably Construe” Standard

- Significantly broadened the scope of rules, policies, and handbook provisions that lawfully may be maintained under the NLRB

- NLRB Memorandum GC 18-04 (June 6, 2018)
POLICIES

Social Media Policy Development

- Specific language (with examples & context)
- Disclaimers regarding Section 7
- Consistency with, and reference to, other policies
- Identify platforms + when/where it applies
POLICIES

Social Media Policy Development

- Remind employees of responsibility and impact/permanency of social media use
- Eliminate expectation of privacy in company technology
- Include disciplinary rights
POLICIES

Don’t Forget

- Training on policy is critical
- Rank-and-file, as well as managers
- Special work settings
SOCIAL MEDIA POSTS IN LITIGATION
SOCIAL MEDIA POSTS IN LITIGATION

- Discoverability of Social Media

- Impeachment

- Work product doctrine and attorney-client privilege

- Social media use of jurors
QUESTIONS? FEEL FREE TO REACH OUT!
QUESTIONS?

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THANK YOU

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