Social Media in the Workplace: Legal Risks and Case Studies

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Agenda

- ► What is Web 2.0?

- ► Web 2.0 Case Studies

- ► Web 2.0 Policy Considerations

Social Media in the Workplace

Management Concerns

► 74% of managers believe that social networking sites put their firm/brand reputation at risk

► 15% consider these risks at the Board level

► 17% have risk mitigation policy/program in place*

* "Social Networking and reputational risk in the work place" Deloitte LLP 2009 Ethics & Workplace Survey results: available at http://www.deloitte.com/dtt/cda/doc/content/us_2009_ethics_workplace_survey_150509.pdf

Social Media in the Workplace

Know the Risks of Web 2.0 Activity

► Discrimination / Harassment

► Privacy Violations

► Stored Communications Act

► Negligence

► Defamation

► IP Infringement, Off-the-Clock Work

► National Labor Relations Act

And Where to Find Them

► Employees' Use of Web 2.0

► Employers' Use of Web 2.0 in Recruiting

► Employer-Sponsored Social Networking

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Consequences of Unregulated Web 2.0 Activity

► **Information Technology**

  - Stress on finite systems and networks
  - Exposure to viruses and malware

► **Management Operations**

  - Lost productivity
  - Compensable time questions
  - Employee morale issues – employee favoritism, improper inquiries (to "friend" or not to "friend")

Driven to Distraction?

► Companies that allow Facebook lose an average of 1.5% in employee productivity

► 77% of workers who have a Facebook account use it at work.

► One in 33 workers <u>only</u> use Facebook at work.

► Of those using Facebook at work, 87% said they had no clear business reason for using the site.

Consequences of
Unregulated Web 2.0 Activity

► Communications/Public Relations:

- Forum for public complaints about company or workplace

- Client and customer relations issues

- FTC endorsement guidelines

► Human Resources:

- Circumvention of neutral reference policies

- Morale issues

- Discrimination, harassment, retaliation

Public Relations Problems?
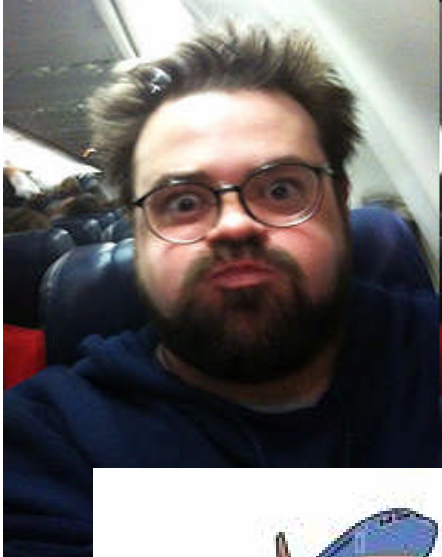
"Dear @SouthwestAir – I know I'm fat, but was Captain Leysath really justified in throwing me off a flight for which I was already seated?"

"Dear @SouthwestAir, Captain Leysath deemed me a "safety risk." Again: I'm way fat… But I'm not THERE just yet. But if I am, why wait till my bag is up, and I'm seated WITH ARM RESTS DOWN… in front of a packed plane…"

"So, @ SouthwestAir, go f*** yourself. I broke no regulation, offered no "safety risk" (what, was I gonna roll on a fellow passenger?). I was wrongly ejected from the flight… And f*** your apologetic $100 voucher, @SouthwestAir."

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Employee Relations Problems?

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Legal Risks of <u>Un</u>regulated Web 2.0 Activity

► ## Legal Risks:

- Document retention and e-discovery issues

- Exposure of confidential information/trade secrets

- Vicarious liability for discrimination, retaliation, defamation, invasion of privacy, trademark & copyright infringement, otherwise illegal content

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Web 2.0: Discrimination / Harassment

domelights.com
the voice of the good guys

► Domelights.com

- Black police officers sue Philadelphia P.D. for failing to shutdown racist social networking site

► Beer Summit '09

- Boston PD fires officer for sending mass-email regarding

Other Liability

► **Abuse of Computer Policies/Systems**

- Employee arrested after using his work computer to access and disseminate child pornography

- Employer held liable for failing to take action

Enforce your computer-use policies

Train your managers

Limits on Regulating Web 2.0 Activity

► **Legal Considerations for Private Employers**

- "Cause" restrictions on termination
- NLRA – "protected concerted activity"
- Whistleblower protections – SOX
- Retaliation concerns following *Burlington North*
- Statutes protecting lawful off-duty activities, use of lawful products (i.e., smoking bans)
- FCRA and other limits on background checking
- Restrictions on use of personal identifying information
- Privacy considerations

Limits on Regulating Web 2.0 Activity

► Further Legal Considerations

  - Electronic Communications Privacy Act
  - Stored Communications Act
  - Communications Decency Act

Stored Communications Act

► <u>Pietrylo v. Hillstone</u>

- Employees at Houston's Restaurant start "Gripe Group" on MySpace

- Managers eventually gain access to the site

- Terminations (and federal lawsuits) ensue…

Limits on Regulating Web 2.0 Activity

► **Additional Legal Considerations for <u>Public</u> Employers:**

- **Privacy and Fourth Amendment concerns**
  – *Quon v. City of Ontario*

- **First Amendment concerns**

- **Anti-SLAPP statutes**

More Limits on Regulating Web 2.0 Activity

► Public Relations Considerations

- Drawing greater attention to unfavorable posts

- Causing same or other posters to post even more

- Creating public perception that company is "unfair" to employees or customers

- Turning into "Big Brother"

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Milestones in Life of Your Web 2.0 Policy

► **Pre-Employment (Screening)**

- Discrimination
- Disparate Treatment
- Fair Credit Reporting Act

► **During Employment**

- Discipline
- Marketing

► **Post-Employment (Recommendations)**

- "Review" and "recommendation" risks on LinkedIn or similar sites (circumvention of neutral reference policies)

E-Recruiting

► **Think before you Google:**

- definitions of "applicant"/"application" and resulting recordkeeping obligations for records from searches

- restrictions on background checks

- protection of lawful off-duty activity

- (in)accuracy and (un)reliability of online information

- risks in learning protected class information

- obligation to comply with company policies, both in searching for and using information

- risks of inconsistent practices in searching

E-Recruiting Best Practices

- Develop guidelines as to type of information sought, how it relates to job qualifications, what types of information may be disqualifying and why

- Comply with FCRA and other statutes re: background checks, particularly where a third party entity is providing the information

- Comply with statutes pertaining to arrest and/or conviction records and use and disclosure of such information

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E-Recruiting Best Practices (cont.)

- Develop protocols as to what search engines, networking sites or other Internet resources will be used, and procedures for verifying information obtained

- Run searches consistently as to all candidates for a given position, regardless of protected class status

- Comply with anti-discrimination laws

- Build firewall between HR and hiring managers to insulate decision-makers from protected trait information

E-Recruiting Best Practices (cont.)

- Consider providing applicants opportunity to respond / explain

- If search results disqualify applicant, record results used and reasons why disqualifying

- Retain search results consistent with the company's customary record retention protocols

Criminal Background Checks

► Mass. – "Ban The Box" CORI Reform

► Limits on <u>direct inquiries</u> into arrest and conviction records

- No first convictions for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace

- No misdemeanors where conviction or sentence ended 5 or more years ago (unless convicted of another offense since that time)

- No sealed records regarding prior arrests, criminal court appearances or convictions.

- No delinquency or child services cases, unless they resulted in conviction

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E-Justice

► ## August 2009 Survey

- 17 percent of companies with 1,000+ employees report having issues with employee's use of social media.

- 8 percent report dismissing someone for their behavior on sites like Facebook and LinkedIn.

- 15 percent have disciplined an employee for violating multimedia sharing / posting policies

- 17 percent disciplined an employee for violating blog or message board policies

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Fired for Facebook

Fired for Facebook

► Brixx Pizza (Charlotte, N.C.) waitress received $5 tip after couple stayed 3 hours for lunch, forcing her to work an hour past her quitting time

► She later wrote on her Facebook page: "Thanks for eating at Brixx you cheap piece of ----camper."

► Fired 2 days later for violating company policy against speaking disparagingly about customers

► Also violated second policy against casting the restaurant in a negative light on social networks

Others Fired for Facebook

► Patriot cheerleader fired over controversial pictures posted on her Facebook page from Halloween party (with passed-out man covered in graffiti, including swastikas and anti-Semitic remarks)

► U.K. teenager fired for calling her job "boring"

► Philad. Eagles stadium employee fired for posting opinion regarding team's trading practices

► Swiss woman fired after calling in sick with migraine b/c light from computer would bother her, and needed to lie in a dark room; and then caught logging onto Facebook

Fired for Privacy Violations

► **University of New Mexico Hospital**

- Fired 2 employees for posting pictures of patients on MySpace

- What is your policy on cell phone cameras in the workplace, and client/customer-related postings?

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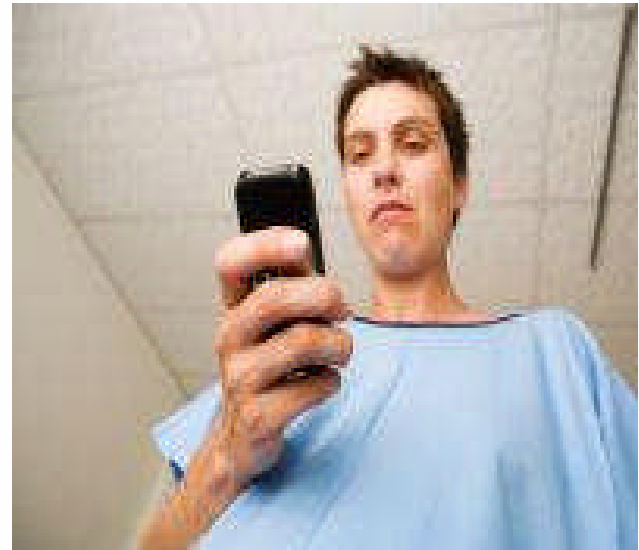
Fired for Blogging

► **Yoder v. University of Louisiana**

- Nursing student expelled for blog post about giving patient epidural (patient not named)

- Judge orders her reinstatement

2. "You're all glowing"

Oh really? Is that all the sweat from having to lug 35 extra lbs?

3. "Babies are God's little miracles"

I gotta admit, there is something freakishly fascinating with the fact that one bunch of coiled protein grows a tail, forms an army, and a coiled protein (which gets released by signals from a whole lot of proteins and waits patiently in a soft bed of all sorts of other proteins 46, immediately gets determined whether it's an XX or XY, or XXY or XYY, or some retarded XXXY ... anyway, it's an amazing process are demons sent to us from hell to torture us for the whole eternity.

The anesthesiologist comes in and sets up my girl with an epidural. Having it done is one thing; watching someone else getting it done out this teeny needle first and numbed her up. Then she took out this huge-ass 10 inch needle and jammed it into her spine!
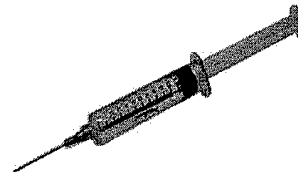
I was watching the whole thing, with my face changing expressions like Louis De Funès'. But I guess everything went fine, because my position in no time, waiting for the Creep to show up.

Fired (+ Felony Charges) for YouTube

► "Dirty Dominos" video goes viral

► More than a million "disgusted viewers" (NY Times)

► Charged with delivering "prohibited food"

E-Referrals

► LinkedIn

- What is your policy about providing referrals for former employees?

- Are you enforcing it in cyberspace?

E-Marketing

► Corporate-sponsored social networking and blogs:

- Consider whether networking activity is compensable time

- Establish level of content monitoring

- Forbid anonymous posting

- Establish appropriate boundaries on use

- Emphasize that site is not to be used for HR complaints

E-Marketing (cont.)

► Typical issues (revealing trade secrets, copyright)

  ▪ Know your trademark

  ▪ Report claims of infringement

► Off-the-clock work

  ▪ Non-exempt v. exempt workers

  ▪ PDAs
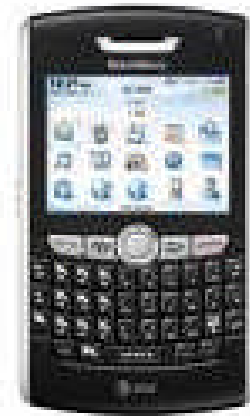
Monitoring & Enforcement

► ## Big Brother?

- In 2007, nearly 1/3 of companies reported employing staff to read outbound email*

- 16% dedicate a staff person to monitoring email full time*

- In 2009, 60% of managers surveyed said they have a "right to know" what employees are posting on social networking sites**
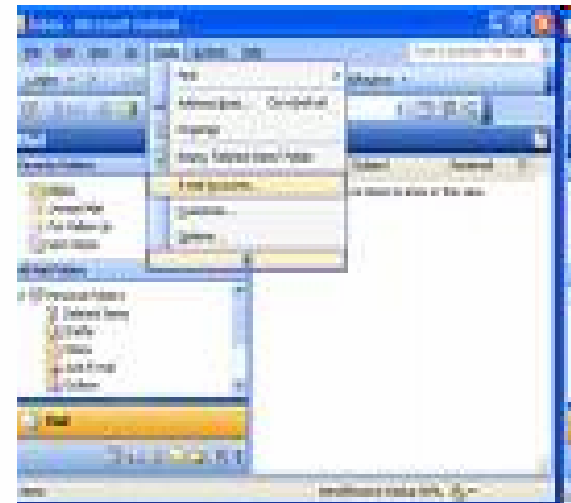
* "MySpace Can Get You Fired," NY Times (July 19, 2007) (citing survey conducted by Forrester Consulting on behalf of Proofpoint: available at http://bits.blogs.nytimes.com/2007/07/19/myspace-can-get-you-fired/).

** "Social Networking and reputational risk in the work place," Deloitte LLP 2009 Ethics & Workplace Survey results: available at http://deloitte.com/dtt/cda/doc/content/us_2009_ethics _workplace_survey_150509.pdf)

Social Media in the Workplace

Implementing an Effective Web 2.0 Policy

1. No expectation of privacy

2. Specify what activity is allowed during work hours and on company systems

3. Specify time limits (if any)

4. All company policies apply equally to Web 2.0

5. Distance employees' personal use from company

6. Consider impact on third parties (set the ground rules for interactions with clients, competitors, vendors)

7. Monitor

8. Train, Train, Train!

Social Media in the Workplace

Implementing a Web 2.0 Policy (cont.)

► Regulate information and IT overall

- NO expectation of privacy
- Comprehensive coverage of current hardware, software and activity (*it's not just for email anymore*)

► There is NOTHING new under the sun - stress that *all* company policies apply *equally* to Web 2.0, and integrate Web 2.0 into those policies.

- Anti-discrimination and non-harassment
- Confidentiality and trade secrets
- Securities and other legal/regulatory concerns
- Neutral reference policies

Implementing An Effective Policy (cont.)

► **Distance company from employees' personal use**

- Prohibit use of trademarks, graphics or logos

- Prohibit use of employer-provided email address for personal Web 2.0 activity

- Require disclaimers – but remember the practicalities imposed by the medium

- Emphasize employees' accountability for the content they post

Implementing An Effective Policy (cont.)

► Consider third parties

- State ground rules for discussing competitors, clients, vendors – business as well as defamation concerns
- Be mindful of third-party intellectual property

► Train

- Develop guidelines for those who use Web 2.0 on the Company's behalf
- Advise managers/supervisors of rules/responsibility
- Train employees

► Monitor

- Be vigilant about company names and marks
- E-Justice is fine, but don't overreact

Final Thoughts for Drafting Policy

► Culture and Philosophy

► Code of Conduct

► Enforcement

► Integrate your social media/tweeting/blogging policy into your entire computer-use policy

► *Update policy when technology evolves*

  ▪ Sample policies collected at: http://ebennett.org/hsmp/

Social Media in the Workplace

Other Related Issues

► **Social networking discovery**

- Discovery of employees' social networking site content, even where restricted access/private

- *EEOC v. Simply Storage Mgmt.* (S.D. Ind. 2010)

FLITTERIN = FACEBOOK + TWITTER + LINKEDIN

CHECK THIS OUT. WITH *FLITTERIN* I CAN CONNECT TO MY FUTURE BOSS, MY PAST FLAMES AND MY CURRENT OBSESSION ALL IN ONE PLACE!

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Thank you

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