



SOCIAL MEDIA

POLICIES, LITIGATION, AND TRENDS

David J. Houston, Esq.
Ryan M. Shannon, Esq.
Dickinson Wright PLLC
June 14, 2011

ROADMAP

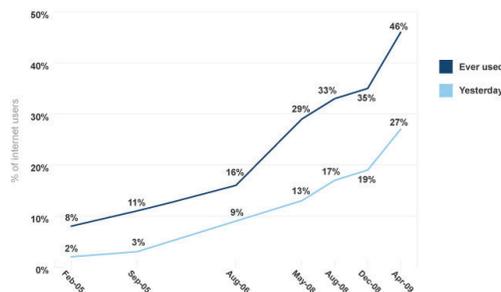
- Social Media Overview
- Legal Considerations for Employers
- Importance of Management of Social Media Issues
- Crafting the Social Media Policy
- Questions & Answers

SOCIAL MEDIA OVERVIEW

THE RISE OF SOCIAL MEDIA USE

Growth in Adult SNS Use, 2005-2009

46% of online American adults 18 and older use a social networking site like MySpace, Facebook or LinkedIn, up from 8% in February 2005.



Pew Internet
The Center for the Study of Online Life

WHAT'S NEXT?

"It's the youngsters who will dictate the future of social media and networking. They're telling us what the future trends will be, and a lot of it has to do with the increasing use of social media to do more or less everything. And that will be how people will build their reputations, and that is how the business communication of the future is beginning to work already."

- Craig Newmark, founder of craigslist.org

www.dickinsonwright.com

DICKINSON WRIGHT^{PLLC}
global leaders in law.

LEGAL CONSIDERATIONS

LAWS IMPLICATED

- Background Checks
- Employment Discrimination Statutes
- Anti-Harassment Protections
- Anti-Retaliation and Whistleblowing Statutes
- National Labor Relations Act and Public Employment Relations Act
- Invasion of Privacy and Stored Communications Act
- Off-Duty Conduct Statutes
- Other Risks

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

BACKGROUND CHECKS - GET IT RIGHT

- Accuracy and Verifiability
- Fair Credit Reporting Act.
- Does a Duty to Search Exist?

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

EMPLOYMENT DISCRIMINATION STATUTES – "AT WILL" ISN'T THE ANSWER

Statutes prohibiting discrimination on the basis of a "protected classification" must be considered when performing research on or reviewing social media, *and* in drafting a social networking policy, including for example:

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Genetic Information Nondiscrimination Act of 2008
- Michigan Civil Rights Act
- Michigan Persons With Disabilities Civil Rights Act

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

CONSTRUCTIVE NOTICE OF PROTECTED CLASSIFICATION INFORMATION

- Disparate Impact
 - Actionable disparate impact -- otherwise facially neutral criteria or policies disproportionately impact upon applicants or employees due to the protected characteristics.
 - Importantly, a disparate impact claim does *not* require the plaintiff to prove that the employee *intended* to discriminate.
- Obligation to maintain record of information accessed may exist
- Expansion of EEOC and judicial regulation and interest a ***certainty***.

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

ANTI-HARASSMENT

Statutes establishing employer liability for **harassment** of an employee by co-workers or others on the basis of a protected characteristic appear to impose some obligation on the employer to "police," or at least react to, social media.

- *Blakey v Continental Airlines*

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

ANTI-RETALIATION AND WHISTLEBLOWING

Where employee communications concern a protected topic or reporting activity, Employer access to or monitoring of those Social Media communications may establish the employee's *prima facie* case of retaliation.

Whistleblower Act Protection of communications

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

NATIONAL LABOR RELATIONS ACT: NOT JUST FOR UNION EMPLOYERS

- Section 7 – “Employees shall have the 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 the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.”
- This provision applies to unionized and non-unionized employees.
- Unionized and non-unionized employees have the right to discuss and communicate through social media about, their working conditions and employment complaints, including criticism of the Employer, Supervisors, or even other employees.
- Beware of application of NLRB "no-solicitation/no-distribution" rules which also apply in a non-union setting.

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

RECENT NLRB SOCIAL MEDIA ACTIVITY

The NLRB has been increasingly active in the social media sphere:

- *American Medical Response* -- overbroad social media policy; employee's facebook comments about supervisor were protected activity (case settled)
- *Hispanics United of Buffalo, Inc* -- NLRB argues Facebook comments regarding quality of services provided by nonprofit were protected activity (ongoing)
- *Lee Enterprises, Inc* -- NLRB upheld termination of reporter who made discourteous and unprofessional Twitter comments
- *Karl Knauz Motors, Inc* -- NLRB argues Facebook posts about quality of hot dogs at BMW sales event were protected activity (ongoing)

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

STORED COMMUNICATIONS ACT

- The Stored Communications Act establishes liability where a person intentionally accesses stored communications without authorization or in excess of the authorization given.
 - *Pietrylo v Hillsdale Restaurant Group*
- Some employers have requested prospective employees to consent to a review of social media profiles and disclose passwords, but it is not clear that such authorization will be sufficient under the SCA, and such requests will likely be controversial

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

OTHER LEGAL CONSIDERATIONS

- Off Duty Conduct
- Michigan "Right to Know"
- Disclosure of Trade Secrets, confidential information
- Disparagement of Entities or Persons - Imputed to Employer

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.



SOCIAL MEDIA AND NETWORKING: ONLINE INFLUENCE AND REPUTATION MANAGEMENT

WHY DOES SOCIAL MEDIA MATTER?

"It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently."

- Warren Buffett

"Brands need to 'establish a social media policy, because without such precautions, 'we're giving people loaded guns to do incredible harm.'"

- Stuart Elliot, *When the Marketing Reach of Social Media Backfires*, NY Times (March 15, 2011)

SOCIAL MEDIA POLICIES WHAT IS YOUR COMPETITION DOING?

dooced: to lose one's job because of one's Web site (www.urbandictionary.com)

- 5% of the U.S. workforce maintains blogs
- 15% of U.S. employers have blogging policies
- Of those employers that block certain Web sites (65%), half restrict access to social networking sites and 18% "have concerns" about employee visits to external blogs
- 12% of employers monitor the blogosphere to see what is being written about them (Google blog alert)
- 51% of end users access social media sites at least once per day
- 79% of employees use social media at work for "business reasons"
- 82% use social media sites at work for personal reasons

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

RISE IN USE IN THE WORKPLACE

Workplace Media's Brand Impact Social Networking Survey

- **43% of workers access their social networking site at work**

Nucleus Research's Measuring the Cost to Business of "NOTworking"

- **77% of workers studied were on Facebook**
- Employees averaged **15 minutes per day of access at work**
- **One in 33 of the workers created their Facebook profile at work**

Informal Research on Twitter

- **42 "I hate my job" tweets per hour on a Monday on Twitter**

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

A FEW THRESHOLD CONSIDERATIONS

- Do you want to use Social Media in hiring and selection activities?
- How will the Employer monitor work-related Social Media?
- How much monitoring do you want to do?
- What employee actions will result in discipline?
- Who will be allowed to represent the company to the public?
- Who owns employee-generated social media?
- Who owns information related to those social media?
- Are communications among employees or between employees and supervisors or others to be encouraged or discouraged?

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

POLICY FUNDAMENTALS

- Be Thoughtful
- Be Comprehensive
- Affirmative Use
- Prohibitions
- Smell Test

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

OTHER RECOMMENDATIONS

- **Make sure the Social Media policy conforms with other policies**
 - No Expectation of Privacy Policy
 - Internet and Electronic Communication Policy
 - Cell Phone and Business Equipment Usage
 - Anti-harassment and Anti-discrimination Policies
 - Confidentiality Agreement and Policy
 - Code of Business Conduct
- Consider training for employees and supervisors

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

OWNERSHIP OF CONTENT AND INFORMATION

Contacts may be the **employer's** property.

Media may be the **employee's** property.

Avoid disputes and prepare contracts or policies specifying access and control.

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

THE TAKEAWAY

Thoughtful planning and policy implementation are not optional!

Be an *H.R. Hero*, and keep YOUR ENTERPRISE ahead of the curve, adding value and avoiding time- and money-wasting claims and disputes.

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

QUESTIONS???

FOR ANSWERS TO YOUR EMPLOYMENT QUESTIONS
OR HELP CRAFTING A SOCIAL MEDIA POLICY...

David J. Houston, Esq.

dhouston@dickinsonwright.com

517-487-4777

www.dickinsonwright.com

DICKINSON WRIGHT PLLC
global leaders in law.

SOCIAL MEDIA
POLICIES, LITIGATION, AND TRENDS
SUPPORTING DOCUMENTS

David J. Houston, Esq.
Ryan M. Shannon, Esq.
Dickinson Wright PLLC

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. WHAT IS SOCIAL NETWORKING?..... | 2 |
| II. LEGAL CONSIDERATIONS FOR EMPLOYERS | 2 |
| A. Using Social Media -- Background Checks..... | 2 |
| B. Employment Discrimination Issues | 3 |
| C. Anti-Harassment Statutes..... | 4 |
| D. Anti-Retaliation and Whistle-Blowing Statutes..... | 4 |
| E. National Labor Relations Act | 4 |
| F. Invasion of Privacy and the Stored Communications Act..... | 5 |
| G. Off-Duty Conduct Statutes | 6 |
| H. Other Potential Risks | 7 |
| III. CREATING A SOCIAL NETWORKING POLICY | 7 |
| A. Considerations Regarding Appropriate Employer Policy Statements | 8 |
| B. Employer-Encouraged Blogs and Sales Contacts Profiles | 9 |
| C. Sample Problems and Fixes | 10 |
| IV. THE TAKE-AWAY! | 11 |

SOCIAL MEDIA

POLICIES, LITIGATION, AND TRENDS

The incautious use of social media has increasingly become fodder for sensational legal stories. A prospective juror in the high-publicized Casey Anthony trial, for example, was dismissed from the jury pool after tweeting “book coming soon.”¹ Another juror on the same panel was earlier dismissed after posting to Twitter[®] that “[c]ops in Florida are idiots and completely useless.”

Perhaps closer to home is the recent Complaint issued by the National Labor Relations Board (“NLRB”) against Knauz BMW, a Chicago-area BMW dealership, for wrongful termination of one of its salesmen in violation federal labor laws.² The employee there was a car salesman who was terminated after Knauz BMW discovered the employee’s Facebook[®] postings critical of the quality of the hot dogs the dealership had offered at a recent sales event. Because the employee’s posts were public and could be seen by other dealership employees, it may well be that the employee was engaging in a federally protected discussion of the terms and conditions of employment, although that case is still pending.

The number of adults who have a profile on a social networking site such as LinkedIn[®], Facebook[®], and MySpace[™] has increased rapidly over the past four years. The percentage of adults who use online social networking websites has grown from 8% of internet users in 2005 to 65% in 2011.³ Despite the rising popularity of social networking sites, however, most companies have no formal plans to address the use of social networking sites by employees.⁴ This leaves employers exposed to multiple legal and marketplace risks.

¹ Social Media Affects Murder Trial of Casey Anthony, PALM BEACH POST (May 14, 2011), available at <http://www.palmbeachpost.com/news/state/social-media-affects-murder-trial-of-casey-anthony-1474972.html>

² *Karl Knauz Motors, Inc d/b/a Knauz BMW*, Case No. 13-CA-46452 (2011).

³ HARRIS INTERACTIVE, *The Pros, Cons and Learning Curve of Social Media* (2011), available at <http://www.harrisinteractive.com/vault/HI-Harris-Poll-Social-Media-Online-Privacy-2011-01-18.pdf>

⁴ See MANPOWER, *Social Networks vs. Management? Harness the Power of Social Media* (2010), available at <http://www.manpowergroup.com/research> (finding only 24% of American employers had developed social media policies); DELOITTE LLP, *Ethics & Workplace Survey Results: Social Networking and Reputational Risk in the Workplace* (2009) (finding only 17% of executives surveyed had programs dedicated to monitoring and mitigating risks related to social networks).

I. WHAT IS SOCIAL NETWORKING?

“Social media” includes a variety of web-based communication platforms “through which users create online communities to share information, ideas, personal messages, and other content.”^{5,6}

II. LEGAL CONSIDERATIONS FOR EMPLOYERS

Social media is involved and intertwined in the workplace, at home, mobilely, and in all areas in between. In addition, social media affects employees and employers, stockholders, customers, and the employer’s connection and reputation with the public at large. In short, and as we are all learning nearly every day, social media is just about everywhere. Savvy employers are learning to use social media in many ways, and the law instructs those employers on the permissible – and impermissible – use and regulation of social media and rules.

A. **Using Social Media -- Background Checks**

Social media is an attractive and growing source of information about employees and applicants, but employers must use these resources with caution when making employment decisions. Pertinent issues and potential problems include:

1. Accuracy; Verifiability
2. "Consumer Reporting Agency" social media search may implicate the Fair Credit Reporting Act ("FCRA").⁷
3. Elliott Larsen arrest record.⁸

⁵ See Merriam-Webster Online Dictionary, *available at* <http://www.merriamwebster.com/dictionary/social%2Bmedia>.

⁶ Examples of social media sites include:

Blogs

Microblogs, such as Twitter[®]

Social Networking Platforms, such as Facebook[®], LinkedIn[®] and MySpace[™]

Virtual Worlds, such as SecondLife[®]

Sharing Sites, such as Flickr[®], YouTube[®] and Slideshare[®]

See, Wikipedia, A List of Social Networking Sites, *available at* http://en.wikipedia.org/wiki/List_of_social_networking_websites.

⁷ 15 USC § 1681 *et seq.*

⁸ MCLA 37.2205a

4. Negligent hiring or retention theories⁹ or OSHA “general duty” clause¹⁰ may impose *duty* to search.
5. Other topics referred to below, such as harassment, may impose duty to react to social media.

B. Employment Discrimination Issues

Using social networking sites to research employees and applicants may expose the employer to an increased probability of discrimination claims. Such activity increases the possibility of a typical "protected characteristic" or "disparate treatment" claim alleging intentional discrimination.

1. Protected characteristics are voluntarily disclosed in LinkedIn[®] photographs, birthday disclosure or MySpace[™] sexual orientation discussion.
2. Consulting such sites likely constitutes “notice” of this otherwise impermissible information, whether used or not.
3. Disparate Impact.
4. Employment litigation and electronic-discovery rulings require record of all sites, blogs, or media reviewed or consulted.
5. Third Party Screening of internet information.
6. Genetic Information Nondiscrimination Act ("GINA")¹¹ - first EEOC mention of social networking sites appears in the proposed regulations.¹²

Prediction: Expansion of EEOC regulation of employer utilization of social media information and court review of employer use of other types of employee or applicant information is reasonably certain.

⁹ See, *Zsigo v Hurley Medical Center*, 475 Mich 215 fin 26 (2006).

¹⁰ 29 U.S.C. § 654, 5(1)(a).

¹¹ GINA generally prohibits covered entities from intentionally obtaining genetic information regarding employees.

¹² 29 CFR § 1635.8(b)(ii)(D) provides an exception to the prohibition against obtaining genetic information *may* exist where “A manager ... inadvertently learns genetic information *from a social media platform* which he or she was given permission to access by the creator of the profile at issue ...”.

C. Anti-Harassment Statutes

Despite these and other restrictions, employers may have an obligation to respond to inappropriate online communications. On-line harassment of co-workers is one such area.

1. Internet Harassment -- *Blakey v Continental Airlines*.¹³
2. An employer policy prohibiting such misconduct may help to establish the employer's *Faragher/Ellerth*¹⁴ affirmative defense to harassment claims.

D. Anti-Retaliation and Whistle-Blowing Statutes

Anti-retaliation provisions, found in a wide range of remedial statutes, are a probable source of future claims for protection of employees' online communications. Social media *communications* concerning protected activity, such as discussion of an employer's allegedly discriminatory layoffs, are themselves protected.

1. Anti-retaliation provisions in employment and other regulatory statutes are ubiquitous, for example, *Title VII*, the *Family and Medical Leave Act*, *Sarbanes-Oxley*, and the *Surface Transportation Assistance Act*.
2. Separately, employee communications regarding reporting activities may be protected from adverse employment action by state and federal whistle-blowing statutes.¹⁵

E. National Labor Relations Act

Protection of worker communications is at the core of labor relations statutes. The *National Labor Relations Act* ("NLRA")¹⁶ and its state analog, the *Public Employment Relations Act*, ("PERA")¹⁷, prohibit adverse treatment of employees engaging in protected

¹³ 2 F. Supp.2d 598 (D.N.J. 1998).

¹⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). This rule allows the employer to defeat an otherwise valid harassment claim by showing that it exercised reasonable care to prevent and correct promptly any discriminatory harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

¹⁵ See, for example, the Michigan Whistleblowers Protection Act, MCLA 15.361 *et seq.*

¹⁶ 29 U.S.C. §§ 151-169.

¹⁷ MCL 423.201 *et seq.*

"concerted activity." Unknown to some employers, these statutes and the rights they establish apply to workers in both unionized *and non-unionized*¹⁸ settings.

1. "Protected concerted activities" include posts discussing unionization, and more routine matters such as day-to-day workplace complaints.
2. Employee messaging critical of or negative about the employer constitute protected activity.
3. "No-solicitation/no-distribution" rules must accommodate protected social media communications.
4. Protected activity and impermissible work rules. *American Medical Response*.¹⁹
5. Protected activity. *Hispanics United of Buffalo, Inc.*²⁰
6. Unprotected activity. *Lee Enterprises, Inc., d/b/a Arizona Daily Star*.²¹
 - employees can be disciplined for social media postings which are extremely harsh, overly hostile, or excessively disloyal.

F. Invasion of Privacy and the Stored Communications Act

Many states but not Michigan expressly recognize an employee's "right to privacy."

1. Michigan tort law applies to the employment relationship in specific situations, and imposes liability where a person or entity inappropriately intrudes upon an employee's "seclusion," discloses "embarrassing" private facts, or places an employee in a "false light."²²

¹⁸ See, *Citizens Investment Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (citing *NLRB v. Wash. Aluminum. Co.*, 370 U.S. 9, 14 (1962)). The National Labor Relations Board recently settled a highly-publicized case in which the Board charged an employer with violating the NLRA rights of its non-unionized employees by maintaining an overly broad social media policy. See, *American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (2010).

¹⁹ Case No. 34-CA-12576 (2010).

²⁰ Case No. 3-CA-27872 (2011).

²¹ Case No. 28-CA-23267 (2011).

²² *Ruffin-Steinback v dePasse*, 82 F Supp 2d 723 (E.D. Mich 2000), aff'd 267 F. 3d 457 (6th Cir. 2001)

2. The federal Stored Communications Act ("SCA")²³ establishes civil liability for anyone who intentionally accesses stored, non-public communications either without authorization or exceeds the authorization given.
 - *Pietrylo v. Hillstone Restaurant Group*.²⁴
3. Attempted Workaround - SCA or Private Restrictions to Access.
 - a. Mandatory password disclosure for applicants or employees.
 - b. *But* - City of Bozeman Montana.²⁵
 - c. Public employer, fraudulent or unauthorized access to the employee's social networking profile, blog, or forum may violate the Fourth Amendment's protections against unreasonable search and seizure.
4. As social media constitutes "speech," public employers must consider the public employee's First Amendment right.

G. Off-Duty Conduct Statutes

An employer should be aware of any "off-duty conduct" protection statutes in the states where they have employees.

1. Such statutes limit an employer's ability to regulate employee conduct off the job. E.g.: California, Colorado, New York and North Dakota.
2. Michigan Employee Right to Know Act prohibits an employer from "gather[ing] or keep[ing] a record of an employee's associations, political activities, publications, or communications of nonemployment activities" without authorization from the employee.²⁶

²³ 18 USC § 2701 *et seq.*

²⁴ Case No. 06-5754, 2009 US Dist. LEXIS 88702 (D.N.J. Sept 25, 2009).

²⁵ Montana Town Stops Asking Applicants for Social Network Log-ins, CBCNEWS (June 24, 2009), available at <http://www.cbc.ca/news/technology/story/2009/06/24/montana-online-passwords236.html>

²⁶ MCLA 423.508(1). See Holmquist, *Michigan Employee Right to Know Act--a new Facebook Friend?*, MICHIGAN EMPLOYMENT LAW CONNECTION (April 12, 2011), available at <http://www.michiganemploymentlawconnection.com/2011/04/michigans-employee-right-to-know-act.html>

H. Other Potential Risks

There are a number of other potential risks involved with employee use of social networking sites.

1. Disclosure of customer information, employer trade secrets, or other confidential information through pictures, status updates, or blog posts.
2. Disparagement of other persons, other companies, products, or services may expose the employer to trade defamation or "false light" claims.

III. CREATING A SOCIAL NETWORKING POLICY

At one extreme, social networking interferes with productive work and has a huge negative impact on workplace productivity. At the other, employers are actively directing workers to use social media to manage business relationships and the public image of the enterprise or its products. Each business is well advised to identify its particular goals and restrictions, and adopt an appropriate social media policy.

1. Exponential increase on workplace interruption and productivity loss.
 - a. Workplace Media Reports *43% of workers access their social networking site at work.*²⁷
 - b. United Sample survey found that 15% of all work interruptions are due to personal online activities such as use of Facebook[®] and instant messaging.²⁸
 - c. Nucleus Research reported that one in 33 workers built their *entire Facebook[®] profile at work.*²⁹
2. Enterprising companies have seized upon the new technology as a means for their employees to become more productive and engaged with consumers.
 - a. Survey: "Networked enterprises" -- companies which "use[] collaborative ... technologies intensively to connect the internal efforts of employees and to extend the organization's reach to customers,

²⁷ See WorkPlaceMedia, Brand Impact Social Networking Survey (May 2009).

²⁸ HARMON.IE, Collaboration & Social Tools Drain Business Productivity, Costing Millions in Work Interruptions (May 18, 2011), available at <http://harmon.ie/Company/PressReleases/press-release-may-18-2011>

²⁹ NUCLEUS RESEARCH, Research Note - Facebook: Measuring the Cost to Business of Notworking (July 2009).

partners, and suppliers” -- are increasingly common and demonstrate the value of such an approach.³⁰

- b. Roughly 40% of companies surveyed use social networking and blogs.
- c. Reportedly social networking helped to facilitate employee communications decrease travel expenses, and externally, social media increased the speed and ease of access to experts as well as the loyalty of clients.
- d. Website publisher Edmunds.com, which provides automotive information, for example, has a policy encouraging its employees to use social media in interacting with fellow employees and customers.³¹

A. Considerations Regarding Appropriate Employer Policy Statements

The employer must first determine the goals and purposes of the policy. Encourage internal communications but prohibit external ones to avoid unintended and unsupervised pronouncements? Or vice versa? Or prohibit work-time distractions altogether? The employer must be cognizant of applicable law and practical matters such as how it intends to enforce the social networking policy ultimately adopted.

The following are *examples* of issues the employer should consider:

- Specify the forms of online communication and conduct covered by the policy.
- Permit, limit or prohibit use of the employer’s instrumentalities.
- Permit, limit or prohibit accessing or posting on sites on work time.
- Outline how the company's name and logo may be used, if at all.
- Describe what financial, confidential, sensitive, or proprietary information must be excluded from use or disclosure.

³⁰ See MCKINSEY GLOBAL INSTITUTE, The Rise of the Networked Enterprise: Web 2.0 Finds Its Payday, in MCKINSEY QUARTERLY (Dec 2010), available at http://www.mckinseyquarterly.com/The_rise_of_the_networked_enterprise_Web_20_finds_its_payday_2716

³¹ A copy of Edmunds.com’s guidelines can be found at <http://www.edmunds.com/about/social-media-guidelines.html>

- Address issues such as whether employees may discuss specific clients, whether workplace information may be disclosed including for example, whether photographs of the workplace may be posted, and similar content-specific matters.
- Remind employees that postings on social networking sites are public.
- Encourage employees to engage in responsible and respectful conduct regarding current, former, and potential customers, partners, employees, and competitors.
- Warn employees to avoid conflicts of interest and harm to the employer's business interests.
- Contemplate the legal considerations discussed above and the employer's other employment policies and guidelines, such as its anti-discrimination policy or other code of conduct topics.
- Avoid violation of protected communication rights.
- Outline as appropriate the employer's intended enforcement activities such as monitoring employees' work time activities.
- Outline possible disciplinary actions for policy violations.
- If the employer intends to monitor social media use on company equipment, the policy should make it clear that such monitoring will take place.

B. Employer-Encouraged Blogs and Sales Contacts Profiles

Where employers encourage their employees to maintain blogs or other online publications, issues may arise with respect to ownership of those publications.

1. Contacts may be the *employer's* property.³²
2. Media may be the *employee's* property.³³
3. Clarify ownership, editorial, other rights in writing or preferably contract.

³² See Wyk, *Note: We're Friends, Right? Client List Misappropriation and Online Social Networking in the Workplace*, 11 Vand. J. Ent. & Tech. L. 743 (2009) (discussing the case in more detail).

³³ *Maremont v Susan Fredman Design Group, Ltd*, 2011 U.S. Dist. LEXIS 26441 (ND Ill Mar 15, 2011).

4. Clarify right to control, access and use on departure of employee.

C. Sample Problems and Fixes

Depending on the purpose of the policy and the unique concerns of the employer, the following additional provisions might be added to a social media policy:

- **Company Spokesperson Limitations**
 - **The problem:** Endorsements may create unintended liability under misrepresentation, reliance, or other legal principles, to consumers or others. In addition, the Federal Trade Commission regulates the use of endorsements and testimonials in advertising.³⁴
 - **The policy:** Prohibit or limit employee communications which appear to communicate on behalf of the company, or require employees to state that anything posted is the employee's view alone, not that of the employer, especially where the employer is offering an endorsement.
- **Supervisor Recommendations**
 - **The problem:** LinkedIn[®] and similar sites encourage users to obtain recommendations. Supervisors may provide positive recommendations as a courtesy or other reason, which is later used by the employer to rebut an employer's legitimate basis for an adverse employment action in litigation. Social media posts stating "great job" or "you are an asset to the company" pose the same risk.
 - **The policy:** State whether evaluations and recommendations may be given informally through social networking sites. State whether such statements must be accompanied by qualifying statements.
- **Supervisor / Employee Relationships**
 - **The problem:** Supervisors "friending" employees on Facebook[®] and making connections on LinkedIn[®], blurring the lines of appropriate or expected conduct, or opening the door to "hostile environment" harassment claims where boundaries or harassment-prevention employment policies are ignored.
 - **The policy:** Limit or prohibit these activities. Train supervisors on legal risks of such relationships, and update anti-harassment, anti-

³⁴ 16 C.F.R. Part 255, addressing among other things, false or unsubstantiated statements, and failure to disclose material connections between the endorser and the entity presenting information concerning the endorsement.

discrimination, code of business conduct, and other policies to cover social networking. At the very least, such policies should be reviewed to make sure they do not conflict with the new social networking policy.

IV. THE TAKE-AWAY!

Social Networking is here to stay, and its use, benefits, and problems will increase substantially if not exponentially. More than other contemporary employment issues, social networking offers extremes of opportunities and risks. *Thoughtful planning and policy implementation are not optional!* Be a proactive H.R. Hero, *and keep YOUR ENTERPRISE ahead of the curve, adding value and avoiding time- and money-wasting claims and disputes.*