

WilmerHale Cybersecurity, Privacy and Communications Webinar Series: Regulation of Social Media in the Workplace

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Introduction



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Road Map

A. Uses of Social Media in the Employer-Employee Relationship

1. Recruitment
2. Security and Productivity
3. Termination
4. Risk Management

B. Regulation of Social Media in the Employer-Employee Relationship

1. Recent Legislation
2. Section 7 of the National Labor Relations Act
3. Federal Contractor Pay Secrecy Rule – EO13665



Uses of Social Media in the Employer-Employee Relationship: Recruitment



Employer Uses: Recruitment

- Applicant screening
 - Streamlined resume
- Identify connections to employer and clients
 - Recommendations from connections
- Profile pictures
 - Implicit bias concern



Google Search

I'm Feeling Lucky





Employer Uses: Recruitment, con't.

The Facebook logo, which is the word "facebook" in white lowercase letters on a blue rectangular background.



- Informal assessment of applicant's personality and interests
 - Similar to behavioral interview
 - Gauge maturity level and communication skills
- Workplaces where judgment and confidentiality valued
 - Public safety
- Identify connections to employer and clients
- Preserve reputation and present favorable corporate image
- Thin-slicing concerns/bias concerns



Employer Uses: Recruitment, con't.

Reasons for not hiring:

- Inappropriate photographs or information – 46%
- Information about alcohol or drug abuse – 40%
- Bad-mouthing previous company or colleague – 34%
- Poor communication skills – 30%
- Discriminatory comments – 29%
- Lied about qualifications – 25%
- Shared confidential information – 24%
- Link to criminal behavior – 22%
- Unprofessional screen name – 21%
- Lied about work absence – 13%



Employer Uses: Recruitment, con't.

Reasons To Hire:

- Background information supported professional qualifications – 38%
- Good fit with company culture – 38%
- Professional image – 38%
- Strong communication skills – 37%
- Creativity – 36%
- Awards and accolades – 31%
- Great references – 30%
- Interaction with company's social media accounts – 24%
- Large amount of followers or subscribers – 14%

Source: 2014 and 2015 careerbuilder.com surveys



Suggested Approaches for Employers

- Only employees specifically trained in proper and improper uses of social media should be involved in social media research for hiring
- Employees involved in hiring should be instructed not to share thoughts about candidates with anyone outside the company
- Wait for, and rely on, a reference check
- Employees involved in hiring should be instructed not to use any improper means to access candidates' social networking sites (more on this later)



Uses of Social Media in the Employer-Employee Relationship: Security and Productivity



Employer Uses: Security and Productivity

- Risk that employees may post information on websites about new products, customer lists, inventions, employee pay, etc.
- Potential disclosure of confidential employer information/trade secrets
- Potential reputational damage to the employer
- Potential release of private employee information



Employer Uses: Security and Productivity, con't.

- Technology can track activity on employer network and firm devices by:
 1. Reviewing text messages, voicemails and phone conversation
 2. Recording keystrokes made
 3. Tracking internet searches conducted
- Statistics related to employer monitoring of employee activity
 - 45% of employers track content, keystrokes and time spent at the keyboard
 - 43% store and review computer files
 - 43% monitor email
 - 73% use technology tools to automatically monitor email
 - 40% manually read and review email
 - 12% monitor blogosphere to see what is being written about company
 - 10% monitor social networking sites
 - 66% monitor internet connections; 65% use software to block connections to inappropriate websites

Source: 2014 American Management Association survey regarding workplace monitoring



Uses of Social Media in the Employer-Employee Relationship: Termination



Employer Uses: Employee Terminations

Monitoring network activity can result in terminations

- 28% of employers have fired for email misuse
 - Violation of any company policy (64%)
 - Inappropriate or offensive language (62%)
 - Excessive personal use (26%)
 - Breach of confidentiality rules (22%)
- 30% of employers have fired for internet misuse
 - Viewing, downloading or uploading inappropriate/offensive content (84%)
 - Violation of any company policy (48%)
 - Excessive personal use (34%)



Employer Uses: Employee Terminations, con't.

- Must be consistent in what does and does not constitute grounds for discipline or termination
- A number of states prohibit employers from terminating employees for engaging in lawful activities outside of work



Uses of Social Media in the Employer-Employee Relationship: Risk Management



Employer Uses: Risk Management

- Duty to monitor hostile work environment and illegal uses of equipment and network?
- Guard against potential defamation, hostile work environment or other discrimination claims
- *Doe v. XYC Corp.* (N.J. App. Div. 2005): “An employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee’s activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third-parties”
 - Limited duty absent notice
 - Duty may extend beyond workplace if on notice or if employees are posting to employer message boards or using employer equipment
- Also: Maintaining consistent favorable corporate image, safeguarding confidential information and complying with applicable securities regulations



Suggested Approaches for Employers

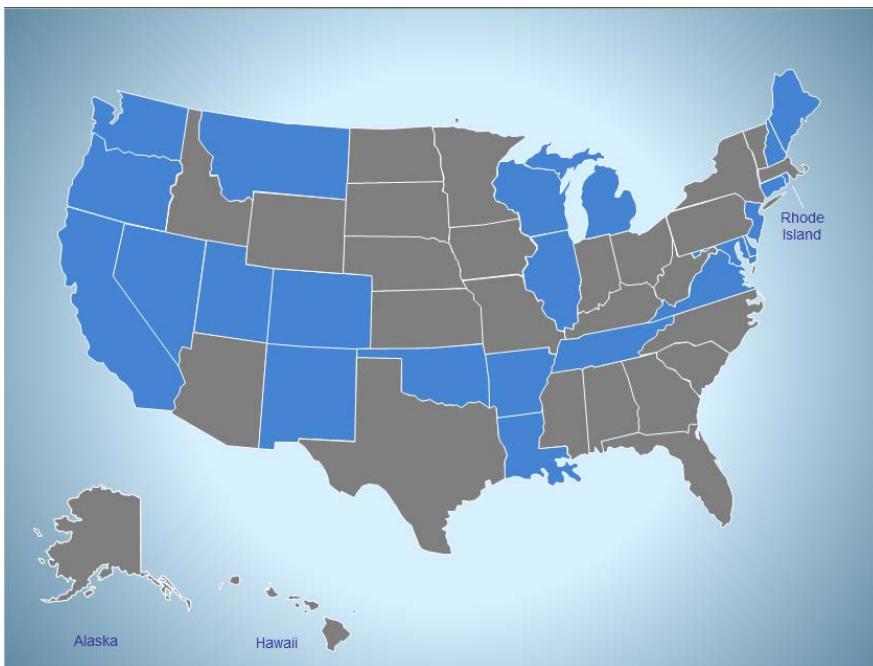
- Decide your company's policy on social networking and blogging
- Determine whether the company wants to permit or prohibit certain uses of company computers/resources
- Implement a policy that applies to all internet activities, including social networking and blogging
- Enforce policy consistently and in a nondiscriminatory manner



Regulation of Social Media in the Employer-Employee Relationship: Social Media Legislation



Legislative Response



New Hampshire
New Jersey
New Mexico
Oklahoma
Oregon
Rhode Island
Tennessee
Utah
Virginia
Washington
Wisconsin

Since 2012, 23 states have adopted social media privacy legislation restricting employer access to employee social media

*Image adapted from Aliah D. Wright, *More States Ban Social Media Snooping*, Society for Human Resource Management



Legislative Response, con't.

- Parallel legislation introduced at the federal level in 2012 and 2013, but did not make it out of committee: Social Networking Online Protection Act (SNOPA)
- National Conference of State Legislatures:
<http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx>



Legislative Response: Impetus

- Robert Collins reapplied for his job as a corrections officer in Maryland from a leave of absence following his mother's death; he was asked for his Facebook login credentials
- Collins: “I was shocked. I was mortified when they asked me for my username and password. So he asked me for the username and password, and then he began to log onto the account. So as he continued to do what he did, I was asking him what he was looking for and what he was doing. Well, he said he was going through my messages, my wall, and my friends list and my pictures to make sure that I was not gang-affiliated.”

Interview on NPR's All Things Considered, (Mar. 21, 2012)

<http://www.npr.org/2012/03/21/149091139/resume-cover-letter-and-your-facebook-password>



Legislative Response, con't.

§ 980. “Social media” defined; prohibited employer actions; exceptions

- (a) As used in this chapter, “social media” means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.
- (b) An employer shall not require or request an employee or applicant for employment to do any of the following:
 - (1) Disclose a username or password for the purpose of accessing personal social media.
 - (2) Access personal social media in the presence of the employer.
 - (3) Divulge any personal social media, except as provided in subdivision (c).
- (c) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.
- (d) Nothing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.
- (e) An employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section. However, this section does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

Statutory Language Varies, But Some Common Themes...

- Restrictions:
 - No “shoulder surfing”
 - No friending requirements
 - No third-party workarounds
 - No changed security settings
 - No retaliation against the employee for not sharing login credentials



Statutory Language Varies, But Some Common Themes..., con't.

- Some common carve-outs:
 - May monitor firm devices and social media accounts
 - May review material in the public domain
 - May monitor the employer's network
 - May restrict employees' access to certain websites using the employer's network or resources
 - May investigate an employee's social media account if it is "reasonably believed" to be relevant to a formal investigation or to ensure compliance with applicable laws and an employer's written policies
- Take advantage of carve-outs to limit liability and comply with securities regulations
- Pay attention to variation across states



Regulation of Social Media in the Employer-Employee Relationship: Section 7 of the National Labor Relations Act



National Labor Relations Act (“NLRA”)

- Passed in 1935 (Wagner Act)
- **Goal:** Eliminate causes of obstructions to free flow of commerce arising out of industrial strife and to mitigate and eliminate such obstructions when they occur by:
 - (1) Encourage collective bargaining
 - (2) Protect employees’ full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection

- 29 U.S.C. § 151



NLRA Section 7

Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ”

-29 U.S.C. § 157



NLRA Section 7, con't.

- An employer violates Subsection 8(a)(1) of the National Labor Relations Act by maintaining “a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights”
 - “If the rule explicitly restricts Section 7 rights, it is unlawful.”
 - “If it does not, the violation is dependent upon a showing of one of the following:
 - (1) employees would reasonably construe the language to prohibit Section 7 activity;
 - (2) the rule was promulgated in response to union activity; or
 - (3) the rule has been applied to restrict the exercise of Section 7 rights.”

Source: *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012)



NLRA Section 7, con't.

- To fall within Section 7's guarantees an employee's conduct must be "concerted" & "protected"
 - Section 7 generally does not protect employee conduct to further purely personal interests
 - Conduct must be with the object of initiating, inducing or preparing for group action
 - Insubordination, disobedience or disloyalty that lacks a sufficient nexus to a legitimate labor interest is not protected



NLRA Section 7 and Social Media

- Employer monitoring of social media may run afoul of “protected activities” under Section 7 of the National Labor Relations Act
- Social media non-disparagement clauses may violate Section 7

Karl Knauz Motors, Inc. 358 NLRB No. 164 (Sept. 28, 2012)

- Social media complaints about workplace conditions constitute protected speech under Section 7 of the National Labor Relations Act:
 - *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 14, 2012);
 - *Design Tech. Grp., LLC d/b/a Bettie Page Clothing & Dtg California Mgmt., LLC d/b/a Bettie Page Clothing, A Single Employer & Vanessa Morris*, 361 NLRB No. 79 (Oct. 31, 2014)



NLRA Section 7 and Social Media, con't.

Karl Knauz Motors, Inc., 358 NLRB No. 164 (Sept. 28, 2012)

- Non-disparagement clause violated Section 7 because the clause was too broad and infringed on employees' rights to engage in concerted activity
 - **Non-disparagement clause**: “Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.”
 - **Courtesy** rule was “unlawful because employees would reasonably construe its broad prohibition against ‘disrespectful’ conduct and ‘language which injures the image or reputation of the Dealership’ as encompassing Section 7 activity, such as employees’ protected statements--whether to coworkers, supervisors, managers, or third parties who deal with the Respondent--that object to their working conditions and seek the support of others in improving them.”



NLRA Section 7 and Social Media, con't.

Karl Knauz Motors, Inc., 358 NLRB No. 164 (Sept. 28, 2012)

- Possible workarounds:
 - Include language that Section 7 statements do not fall within the ambit of any “Courtesy” rule
 - Draft rules with more narrowly-tailored language



NLRA Section 7 and Social Media, con't.

Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (Dec. 14, 2012);
Design Tech. Grp., 361 NLRB No. 79 (Oct. 31, 2014)

- National Labor Relations Board held that social media complaints about working conditions on Facebook constituted protected speech
- One commentator described a continuum between:
 - Protected activity: e.g., a Facebook post rallying support regarding working conditions
 - Unprotected activity: e.g., an employee's tweet that complains about the employer's product



Regulation of Social Media in the Employer-Employee Relationship: Federal Contractor Pay Secrecy Rule – EO13665



Federal Contractor Pay Secrecy Rule – EO13665

- Rule: Federal contractors may not retaliate against applicants who ask about or discuss compensation or current employees who choose to discuss their compensation
 - E.g., social media posts regarding compensation on LinkedIn or Glassdoor
- Limits of Rule: (1) only applies to federal contractors, and (2) limited to discussion of compensation
- Exception: Employees cannot disclose compensation information that they learn about in connection with an essential job function



Corporate Social Media Policy Do's

- Guard against implicit bias creeping into hiring decisions based on review of an applicant's social media accounts, which might lead to a discrimination claim based on an applicant's race, sex, religion, disability or other protected characteristic
- Draft employee agreements that explicitly disclose that an employee's use of the employer's equipment and the employer's network may be monitored
- Monitor network and equipment to ensure appropriate uses of technology and maintain compliant work environment
- Apply technology policies consistently
- Take advantage of carve-outs that permit investigation into violation of applicable regulations, laws or violations of employment agreements



Corporate Social Media Policy Don'ts

- Do not require applicants or employees to:
 - Disclose login credentials to personal social media accounts
 - Require friending or loosened security settings
- Do not draft “courtesy” rules that could be construed to include broad prohibitions of conduct that falls within the ambit of Section 7 activity
 - Employees must be permitted to object to their working conditions and seek the support of others in improving them
 - Instead, draw social media policies narrowly to bar specific unauthorized uses
- Do not rely on potentially inaccurate information
- Do not prohibit employee discussions of compensation



Some Concluding Takeaways

- Employer interest in social media growing
 - Recruitment / Productivity / Discipline/ Risk Management
 - Be sure employees who use social media as source in hiring or discipline are properly trained
 - Monitoring can be helpful but must be carried out in proper ways
- Recent legislation precludes or restricts employer access to employee social media accounts in many states; need to track and parse state-by-state
- NLRA Section 7 protects certain activities around the “virtual water cooler”:
 - Non-disparagement clauses
 - Right to complain and organize regarding working conditions



Follow-Up Questions



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