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Social Networking and Employers

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It's interesting to see how advances in computer-based communication technologies are changing how we (or those we know) act and interact. The novelty is ever-refreshed with smaller, faster, cooler gadgets like smartphones and innovations in "social networking" formats like Facebook and Twitter. In a recent article in *Crain's Cleveland Business* http://www.crainscleveland.com/article/20091005/SUB1/310059973/1005&Profile=1005, Chuck Soder discussed employer social networking policies from a marketing point of view. Social networking policies are also a "hot issue" for employment lawyers these days. Although there is still no real consensus as to what the "right" policy is, the pertinent issues are coming to light.

The first thing employers should already recognize is that the new technologies are challenging the nature of the traditional employment relationship. "Social networking" itself is still changing. It's impossible to tell what the next social networking fad will be, and impossible to say what will become of the current social networking giants.

There are good and bad aspects of social networking, depending on who's asking. Marketing and communications companies, for instance, have to stay alert to new media. New-technologies companies have to promote their relevance or hipness by addressing cutting edge trends. On the other hand, other companies, such as financial companies or law firms, place a premium on confidentiality, and should develop policies that set a tone of discretion. Nevertheless, employers who are too rigid about preventing social networking (as a result, perhaps, of the perceived frivolity of new technologies) may lose opportunities that will arise in the near future. The point is that now is probably a better time than later for employers to consider their policies.

A policy can sometimes be inferred from an employer's current computer use and general conduct policies. A good general policy should state that employees are expected to avoid engaging in inappropriate or offensive activity that may reflect negatively on the employer, its employees, or its business. Employers should also protect themselves with policies stating that employees should have no expectation of privacy in social network posts, and that the employer may be expected to monitor social networking sites from time to time.

In addition, here are some of the employment issues to consider when crafting a social networking policy:

Wage and Hour Issues

One of the main employment law difficulties created by portable communication technologies is that it's hard to tell when your employees are on the clock anymore. Employment lawyers are still trying to catch up with what the Blackberry does to the employment relationship. Now, if a business encourages employees to promote the company on Twitter for marketing reasons, is that employee "suffered and permitted to work" (in the language of the Fair Labor Standards Act) every time she posts or "tweets" (in the language of Twitter)? Do you have to pay an employee overtime for sitting in a bar and texting her cyber-friends about what-she's-doing-now? At this point, an employer should at least consider restricting the company's social networking duties to overtime-exempt workers. As the distinction between at-work and off-work breaks down, employers on the cutting edge of the hip new workplace may also want to think about being on the cutting edge of scrutiny by the Department of Labor.

Scope of Employment

Aside from wage and hour issues, another zone of risk involves employer liability for employee behavior. More technically, it's much more difficult to ascertain whether your employees are engaging in conduct that is within their "scope of employment." The *Crain's* article described an employee of a screenprinting shop posting a pre-distribution image of a print on the employee's Facebook page. Complaints by the artist who created the print inspired the shop to implement a "no photographs" policy. The lawyer wonders, would the artist have had a copyright infringement case against the print shop; that is, at what point could the print shop have been considered the infringer? It would be one thing if the employee's Facebook page were strictly personal and did not mention his employer; but what if he used

Facebook to promote the print shop and displayed many pictures of the shop's products? Then the "personal" Facebook page is drawn closer toward the employee's scope of employment, and the potential liability of the employer has grown.

A cultural (rather than technological) characteristic of social networking is a general disregard for propriety and discretion. Perhaps the convenience of electronic posting makes it easier for us to think less about what we write (and perhaps we think of it more as speaking than writing, or perhaps the initial anonymity of the internet enabled a generally outrageous tone that still carries over to all e-communications), but social media forums are full of statements about employers, co-workers, and customers that could lead to claims founded in defamation, trademark tarnishment, and unfair trade practice. Sometimes it seems the new technology has created a veritable new Gong Show of workplace howlers, as impulsive little twiddlers and You-Tube posters make the news with their amazing lapses in judgment and subsequent releases from employment.

Squelching employees does not have to be the first line of defense. For instance, policies that prohibit all social networking, or require employees to refrain from mentioning the employer's name or business, will defeat the main benefit of the platform as a marketing tool. Most employers should consider how they wish to position themselves in the social media environment, and tailor their policies accordingly: one company may proscribe employees from representing themselves as employees of the company in any post or transmission that is not authorized by the company; conversely, another may *require* employees to name themselves and the company when posting on certain topics or on certain sites. Some high-profile employees, like pro athletes or public-company CEOs, will always be associated with their employers, so different policies or contractual provisions would be appropriate.

Productivity

Also, employers should consider the effect of their social networking policies on work place/work time issues, and simple productivity. New technologies are not only blurring the traditional boundaries of employment, they can fudge the line of what constitutes appropriate work itself. Employers should recognize that cyberslacking isn't just Solitaire and Minesweeper anymore. A once-hot read called *Here Comes Everybody* speculated on the social effects of internet information sharing systems (come on, who's actually going to read a *book like this* about the internet? -- here's the Wikipedia link [http://en.wikipedia.org/wiki/Here_Comes_Everybody]). In it (presumably), author Clay Shirky proposes an axiom: "Communication tools don't get socially interesting until they get technologically boring …. It's when a technology becomes normal, then ubiquitous, and finally so pervasive as to be invisible, that the really profound changes happen." Social networking hasn't become "normal" or ubiquitous, but it's clearly part of "profound changes" that are taking place, even if it's difficult to pinpoint those changes just yet.

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