



Employment Notes

EMPLOYERS MUST CONSIDER IMPLEMENTING SOCIAL MEDIA POLICIES

The boundaries between *personal* and *professional* have become increasingly blurred due to the growing prevalence of internet-based social media, including interactive websites such as Facebook, MySpace, LinkedIn and Twitter. While social media outlets may be excellent platforms for employees to network and promote their employer's business, a myriad of problems may result from an employee's improper or unlawful use of a company's name, reputation or confidential information while using such social media.

As a result, all employers must consider whether to implement a policy to guide their employees in responsibly and lawfully using social media and any employer that encourages its employees to use social media to further business objectives should have a social media policy in place. In deciding whether a social media policy is appropriate, an employer should first reflect upon the concepts described below.

Employee Use of Firm Identity. If an employee uses an employer's name or a company e-mail address to communicate with or otherwise use social media, a third-party may be led to believe that the employee is speaking or writing on behalf of the company. A third-party may think that the employee is acting in an official capacity with authority to bind the employer, or that certain views espoused by the employee are the views of the company. For this reason and others, the FTC has implemented rules effective December 1, 2009, regulating the use of testimonials in advertising. Under these rules an employer may be held responsible for employee maintained blogs or other employee postings about the employer's products and services. In an effort to avoid these problems, a social media policy may direct employees in such situations to use a disclaimer explicitly stating that his or her views are not those of the employer. The social media policy may also provide that employees are not permitted to act or speak as a representative of the company while using social media, unless given prior permission.

Conflicts with Employment Responsibilities. Employees should be prohibited from using social media – whether in or away from the office – in a way that conflicts with their professional obligations or work responsibilities. For example, an employee's use of social media to promote services or businesses that compete with his or her employer may be prohibited. A policy should prohibit an employee's excessive use of social media that results in deficient work performance, and employers may wish to limit employees' in-office use of social media to certain hours. Finally, to the extent employees are permitted to use social media during working time, the policy should prohibit employees from using company

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computers or other equipment to conduct any commercial activity unrelated to the employer's business.

Confidentiality and Intellectual Property Protections. A social media policy should address employees' online use and dissemination of an employer's confidential and proprietary information. The policy should clearly define what information is confidential to the employer and state how employees may or may not use such information. Employers may risk any right they have to protect client contact information by encouraging employees to connect with, link to or friend the employer's clients through the employee's personal social media accounts. These risks need to be balanced with the potential benefits to a business of doing so. The policy should also provide that the employer's intellectual property, including trademarks, logos, and copyrighted material, may not be used by the employee while using social media without the company's prior consent.

Employee Performance Feedback. In the event of a lawsuit by a terminated employee, positive feedback posted on social media by co-workers or supervisors may be used against the company to show that the worker was performing satisfactorily. For instance, in the event of a discrimination claim where a company terminated a worker for poor performance, it would be harmful to the company if one of its supervisors had "recommended" the worker on LinkedIn. As a result, a social media policy may contain a provision that prohibits employees from using social media to comment on or display information concerning the work performance of other employees without prior company consent.

Workplace & Co-Worker Privacy. Employees who use social media should be reminded of the need to honor the privacy rights of their co-workers. Thus, a policy may state that employees should seek permission from co-workers before writing or displaying information that might be considered a breach of privacy or confidentiality. Further, the social media policy should prohibit employees (including supervisors) from gaining or attempting to gain unauthorized or unlawful access to another employee's private and secure social media platform, which may, for instance, be a violation of the federal Stored Communications Act and various state privacy laws.

The Employer's Right to Monitor. Companies should be open with their employees and inform them of the company's right to lawfully monitor their use of social media to protect legitimate business interests. However, the social media policy should also prohibit employees from using any information derived from an applicant's or employee's use of social media to unlawfully discriminate against that individual on the basis of a protected class.

Advising Employees to Use Common Sense. Any social media policy should appeal to employees' common sense and sound judgment. The policy should remind employees that anything they write or display may be used to form opinions about the company and may permanently remain in the public domain. In this regard, the policy should urge employees to use common sense and utilize social media in a knowledgeable, respectful, and professional manner. Specifically, the policy should prohibit employees from jeopardizing the reputation or interests of the employer by making or engaging in personal attacks, obscenities, pornography, lewdness, defamation, harassment, intellectual property infringement, and other inappropriate

behavior. Finally, employees should be reminded that any unlawful conduct while using social media may result in civil or criminal charges against them.

Conclusion. A well-crafted social media policy may be a useful tool for employers to prevent the dissemination of its confidential information, the improper use of its intellectual property, and a host of other problems stemming from employees' use of social media. Consequently, companies should consider whether implementing such a policy would further their business objectives and fit within their company culture.

We are currently planning a panel discussion regarding the risks and rewards of social media in the workplace for late February 2010. If you would like to be added to our mailing list for this event please contact Christy Combs at combs@thshlaw.com or (212) 702-3179.

If you have any questions regarding the implementation of an employee social media policy or other issues of employment law please contact any of the following partners in our Employment Law Group, or other partner at the law firm with whom you work:

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