




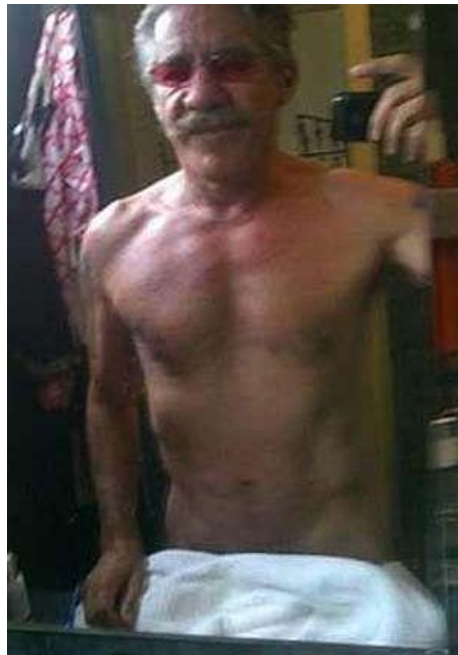
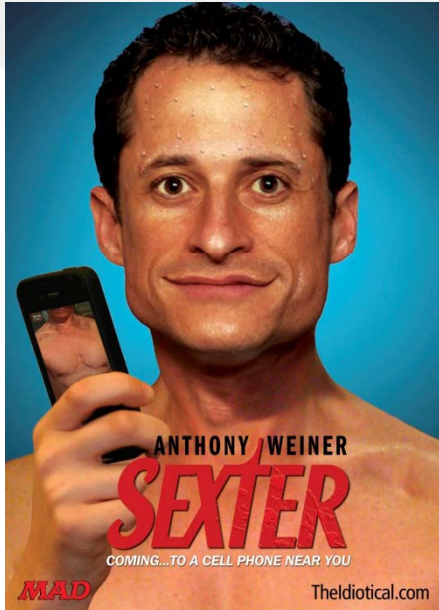
ELECTRONIC COMMUNICATIONS and SOCIAL MEDIA IN THE WORKPLACE

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WHAT IS SOCIAL MEDIA ?

Constantly evolving

Several Categories:

- **Business/Social Network Services:** Users connect to other users to display/share friends/contacts (e.g., LinkedIn, Facebook)
- **Blogs:** Self published websites listing posted information in reverse chronological order (e.g. Twitter)
- **Wikis:** database of webpages that can be edited by the public (e.g., Wikipedia)
- **MMORPG:** games played simultaneously online by several users who adopt avatars to represent themselves (e.g., Second Life)

SOCIAL MEDIA AND THE WORKPLACE



USING SOCIAL MEDIA IN THE HIRING PROCESS



THE PROS

- Advertise positions
- To learn more about potential candidates (e.g., professional organizations)
- To garner information about an applicant's professional qualifications and skills
- To find out other information about the suitability of a candidate for employment

THE CONS

The information may be

- unreliable or false
- “stale”
- misinterpreted
- may not be a fair predictor of job performance
- might be difficult to “delete”

AND . . .

SECURING TMI IS RISKY AND MAY LEAD TO LAWSUITS!



VIOLATION OF ANTI-DISCRIMINATION LAWS

Employers secure information that is not part of the traditional application process:

- Race/color/national origin/citizen status
- Age
- Gender/sexual orientation or identity
- Marital/civil union/domestic partnership status
- Disability (including pregnancy)
- Military/veteran's status
- Religious affiliation

VIOLATION OF DISCRIMINATION LAWS (CON'T)

Once Pandora's box is open, applicant can claim this information was used to intentionally discriminate



Solution:

- Isolate the procurer from the decision maker



DISPARATE IMPACT/UNINTENTIONAL DISCRIMINATION CLAIMS:

Targeted recruiting from select SM sites may give rise to discrimination claims because users of the site are not demographically diverse

- Ex: only 7% of LinkedIn users are Hispanic and only 8% are African American (LinkedIn.com Traffic and Demographics Statistics by Quantcast)

Solution:

- Use multiple avenues for recruitment (traditional media, referrals, job fairs, multiple SM sites)

VIOLATION OF PASSWORD PROTECTION LAWS

August 2013 – NJ became 12th state to prohibit employers from asking applicants/employees to disclose user name, password or other information to access a personal SM account

Solution:

➤ Don't ask!



VIOLATION OF OFF-DUTY CONDUCT LAWS

- Over 50% of the states have laws prohibiting employers from discriminating against employees for specified off duty conduct
- New Jersey protects only tobacco users
- Other states protect the use of any lawful product
- New York among the minority that protect employees engaging in any lawful off-duty conduct (with exceptions)

VIOLATIONS OF THE FCRA

Employers can insulate themselves from liability by using third parties to conduct SM background checks

- companies typically redact information re: applicant's protected status

But employer must comply with the FCRA's authorization requirements before obtaining report

If adverse action to be taken, provide applicant

- with a Statement of Consumer Rights before adverse action
- opportunity to review report and advise of the right to dispute inaccurate information
- reasonable time to contest the information (3-5 days).

BEST PRACTICES FOR BACKGROUND CHECKS (IN HOUSE)

- Employ recruiting plan that includes varied recruitment vehicles
- Develop uniform list of sites searched and describe the lawful information to be secured for ALL background searches
- Limit review to publicly available information
- Do not request passwords or attempt unauthorized access
- Do not connect with friends of prospective employees to secure information about a candidate
- Verify the accuracy of all information/disregard information that cannot be verified

USING EMPLOYEES' ELECTRONIC COMMUNICATIONS/SM TO MAKE EMPLOYMENT DECISIONS POST-HIRE IS STILL FRAUGHT WITH RISK



MONITORING ON EMPLOYER-OWNED DEVICES IS GENERALLY LAWFUL

Stored Communications Act: prohibits unauthorized interception of electronic communications

- does not prohibit authorized access
- does not prohibit employers from intercepting/reviewing communications on employer-owned devices
- BUT . . .



INVASION OF PRIVACY CLAIM?

NJ courts have recognized that employees might have a reasonable expectation of privacy in their workplaces

Right can attach to both public and private sector workplaces!

Solution: Include a No Expectation of Privacy warning to shield against invasion of privacy claims

- Sign on screen
- Stand-alone electronic communications/SM policies signed by employees
- Exception: Attorney/Client Privileged materials

**EVEN IF NO PRIVACY VIOLATION, USING
INFORMATION INTERCEPTED ON
COMPANY-OWNED DEVICES OR
ACCESSED VIA SM SITES MAY BE UNLAWFUL**

THE RISK OF VIOLATING DISCRIMINATION LAWS CONTINUES!

SM sites may reveal additional information that exposes employer to discrimination claims:

- Previously unknown disability
- Pregnancy status
- Sexual preferences
- Religious affiliation
- Marital/domestic/civil union status

What you now know CAN hurt you!

THE RISK OF VIOLATING DISCRIMINATION LAWS CONTINUES (con't)

Ex: John is up for promotion to VP, a key position requiring long hours/significant travel. On his secured Facebook page John posts the sad news that he has been diagnosed with Lou Gherig's disease. John's co-worker and Facebook friend Ben relates the news to Company President Susan. Soon thereafter the position is awarded to another candidate.

Problem?



THE RISK OF VIOLATING DISCRIMINATION LAWS CONTINUES (con't)

Ex: Ted posts on Facebook that he and his longtime partner will be having a Civil Union ceremony. Ted's supervisor Janet was wholly unaware of Ted's sexual orientation until she viewed the post. Coincidentally, Janet had been preparing to terminate Ted for poor job performance.

Problem?



EXPOSURE TO UNLAWFUL RETALIATION CLAIMS

Employees venting on SM about unlawful discrimination in the workplace are protected under the LAD

- Employee blogging about being sexually harassed by a supervisor
- Disabled employee tweeting about the failure to provide accommodations
- Posting on Facebook by employee who suggests he did not get a promotion because he is Muslim

Subsequent adverse action may trigger claim

EXPOSURE TO WHISTLEBLOWER RETALIATION CLAIMS

Employees venting about unsafe conditions/illegal activities in the workplace are protected by CEPA

- RN posting about the incompetency of a member of the medical staff
- Nurse's aide tweeting about high level of medication errors by nursing staff
- Housekeeping employee's email to management complaining of insufficient lighting/security in parking garage

EXPOSURE TO WHISTLEBLOWER RETALIATION CLAIMS (con't)

Ex. Elise works for a pharmaceutical company. Her blog expressed concerns about the safety of certain clinical trials she is working on and her intention to contact the FDA. Elise is then terminated for revealing confidential information.

Problem?

Elise's blog includes clinical trial documents that reveal information about trial participants.

Problem?

VIOLATIONS OF THE SCA

Stored Communications Act only prohibits *unauthorized* communications so material in

- unsecured sites
- sites to which you are granted access
- in the public domain

are all fair game

BUT . . .

VIOLATIONS OF THE SCA (con't)

Ex.: Manager Tanya sets up a fake Facebook account under the name “Layla Shine” and lures her subordinate, Jason, to friend her so she could learn what he was saying about her on his secured Facebook wall. After reading disparaging comments about her, Tanya fires Jason for “poor judgment.”

Problem?



VIOLATIONS OF THE SCA (cont.)

Ex. Supervisor Vernon overhears Raul telling co-workers that Susan posted half naked pictures of herself in her company uniform on her secured Facebook page.

Vernon is not Susan's Facebook friend so he asked Raul to pull up the cite. Raul initially resists but ultimately convinces Vernon to do so. Susan is then fired for violation of the uniform policy and disparaging the reputation of the hospital.

Problem?



VIOLATIONS OF THE SCA (cont.)

Ex. Alisha recently broke up with co-worker Andre. On his Facebook page Andre calls Alisha a whore and other profanities, posts naked pictures of her and claims he will “get even” with her. One of several co-workers who saw the posts, Kevin, provides copies to Alisha, who in turns provides them to HR.

Can Andre be terminated for violation of the company’s anti-harassment policy?

VIOLATION OF OFF-DUTY CONDUCT LAWS

Ex. Bud is being considered for a promotion until Mina, who would be his supervisor, sees a picture of Bud on his Facebook wall smoking a cigarette.



VIOLATIONS OF THE NATIONAL LABOR RELATIONS ACT

Sec. 7 of the NLRA protects employees from retaliation for engaging in “concerted activities” protected under the law

- Forming a union
- Engaging in lawful strikes, work stoppages, etc.
- Grievances
- Communicating with co-workers about wages, salaries, discipline and other terms and conditions of employment

Rights apply to unionized and non-unionized workplaces!

VIOLATIONS OF NLRA (con't)

The NLRB has up stepped its efforts to protect employee's use of SM to vent about discipline, wages and working conditions in the workplace!



VIOLATIONS OF NLRA (con't)

Ex: Wade, a salesman in NYC, posted a picture of his paycheck on Instagram, along with the following comment:

- Paycheck silly to me. Ever since I was a kid I've thought it was completely insane that we have to work all our lives. I still feel that way. Especially when it's only enough to live in a third world apartment with [sh**ty] everything. Which for some reason in NYC is ok . . . I'm done with it.

Wade is terminated for violating confidentiality policy prohibiting disclosure of the company's compensation practices, etc.

Was Wade wronged?

VIOLATIONS OF NLRA (con't)

Ex. Maria was recently disciplined by her supervisor and thereafter sent an email to her co-workers complaining that she was disciplined unfairly, but included a string of highly disrespectful profanities against the supervisor and made disparaging remarks about his management skills.

Is Maria protected?

VIOLATIONS OF NLRA (con't)

Ex: In response to a tweet by the Governor calling for suggestions to reduce government spending, Marcie, a nurse at the University Medical Center, tweeted back that the Governor should stop coming to the center after hours for wellness visits that resulted in overtime costs.

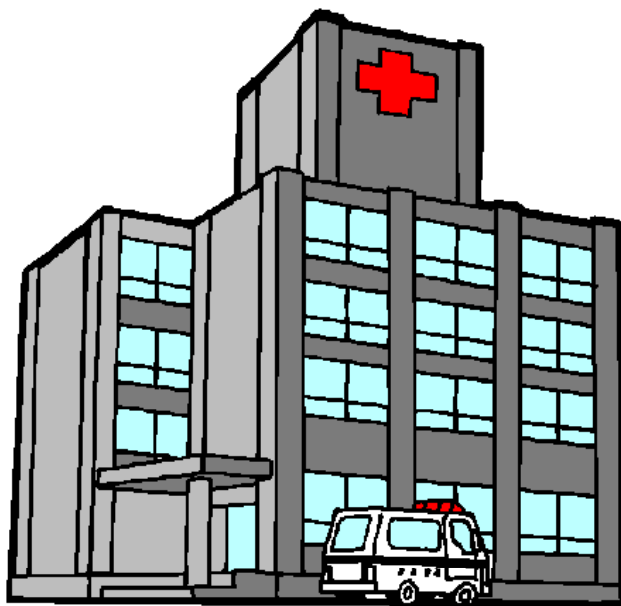
Should Marcie have kept mum?



VIOLATIONS OF NLRA (con't)

Ex. Martin has become dissatisfied with his lack of raises and blogs about how cheap the hospital administration is and suggesting that the community go to a neighboring hospital for their medical care.

Is Martin protected?



VIOLATIONS OF NLRA (con't)

Ex: Deborah, an RN/paramedic and President of the PEMSA - posted the following on Facebook about fatal shooting in the Wash D.C. Holocaust Museum :

. . . Other guards opened fire. The 88 yr old [gunman] was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards Go to target practice.

Co-worker/Facebook friend Ron took a screen shot of the post and forwarded it to management. Deborah was terminated for demonstrating a “deliberate disregard for patient safety.”

Did management violate the SCA? The NLRA?

NLRA: SUMMING IT UP

NLRA protects employees using SM to complain about their bosses, co-workers, job, pay or work environment because these are terms and conditions of employment and the comments are thus protected concerted activity

But . . . the protection might be lost if the communication:

- is libelous
- discloses company trade secrets
- discloses information protected by HIPPA
- Is a violation of *legitimate* company policies
- goes too far and balance tips in favor of protecting corporate reputation, etc.
- is not communicated to a sufficient number of co-workers

**NLRB HAS ALSO DEEMED THE MERE
EXISTENCE OF VARIOUS EMPLOYER
POLICIES A VIOLATION OF THE NLRA**

POLICIES THAT VIOLATE THE NLRA

- Employers violate the NLRA by implementing policies that *might* “interfere” with NLRA rights
- Employers must balance efforts to protect the corporation/employees/clients from untruthful allegations/harassing behavior via the Internet with employees’ right to discuss working conditions
- NLRB will find a violation where the employer promulgates a policy that “chills” employees right to engage in protected concerted activity

POLICIES THAT VIOLATE THE NLRA (con't)

The “chilling effect”

- Rules that are ambiguous as to their application to NLRA, and contain no limiting language or context to clarify that the rule does not restrict NLRA rights, are unlawful
- In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful

Simple, right?

SM POLICIES THAT VIOLATE THE NLRA

“Don’t release confidential guest, *team member or company information*. . .”

- could be interpreted to apply to discussions about wages/terms and conditions of employment

Instructing employees to be sure posts are “completely accurate and not misleading and do not reveal non-public information on any public site”

- could be interpreted to apply to discussions/criticisms of the employer’s labor policies and its treatment of employees

Prohibiting communications about “[a]ny topic related to the financial performance of the company”

- could be interpreted to apply to discussions about wages/terms and conditions of employment

Prohibiting communications containing “[p]ersonal information about another employee, such as . . . performance, compensation or status in the company”

SM POLICIES THAT VIOLATE THE NLRA

“When in doubt about whether the information you are considering sharing falls into one of the prohibited categories, DO NOT POST. Check with the Communications or Department or Legal to see if it’s a good idea”

- requires employer permission before engaging in protected activities

Prohibiting the posting of photos, music, videos, and quotes of others without the owner’s permission, and from using the Employer’s logos and trademarks

- could be interpreted as proscribing the use of photos and videos of employees engaging in protected activities, including photos of picket signs containing the Employer’s logo

“Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline”

- proscribes “a broad spectrum of communications” including protected criticisms of the Employer’s labor policies or treatment of employees

SM POLICIES THAT VIOLATE THE NLRA

“Think carefully about ‘friending’ co-workers”

- could discourage communications among co-workers and contains no limiting language clarifying that it does not restrict protected NLRA activity

“Report any unusual or inappropriate internal social media activity”

- encourages employees to report to management the union activities of other employees

Warning employees to “avoid harming the image and integrity of the company”

- could be construed to prohibit protected criticism of the Employer’s labor policies or treatment of employees

“Don’t comment on any legal matters, including pending litigation or disputes”

- restricts employees from discussing the protected subject of potential claims against the Employer

SM POLICIES THAT VIOLATE THE NLRA

Solution?

- “Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)”
- NLRB has ruled that this does not cure the ambiguities in the policy’s overbroad rules!

SM PROVISIONS THAT PASS MUSTER

“Users may not post anything on the Internet in the name of the Company or in a manner that could reasonably be attributed to the Company without prior written authorization”

- is lawful because the employer is entitled to ensure statements in it's name are authorized

Prohibiting “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct”

- is lawful because it prohibits plainly egregious conduct, such as discrimination and threats of violence

Avoid posts that “could be viewed as malicious, obscene, threatening or intimidating” and prohibiting “harassment or bullying” communications that include “offensive posts meant to intentionally harm someone’s reputation” or “that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy”

- is unambiguous because it provides examples and context that does not include protected activity

DRAFTING A SOCIAL MEDIA POLICY

Remind users that the Company owns ALL data on it's systems and monitor all communications – no expectation of privacy!

Outline the permissible parameters for personal use of SM during work hours

Address whether SM is permitted or required for business or marketing purposes

Address off-duty SM activities

Require employees to state that they are not speaking on behalf of the Company when involved in personal social networking

Require employees to obtain permission to use association with the employer prior to engaging in promotional posting and require employee to disclose association when doing so (FTC requires such disclosure in endorsement postings when the relationship exists)

DRAFTING A SOCIAL MEDIA POLICY

Prohibit unauthorized disclosure of trade secrets, intellectual property infringements and confidential information about clients, etc. (specify)

Warn that employees have legal responsibility for the ramifications of their postings (tort and criminal claims)

Prohibit content that is malicious, obscene, threatening or intimidating

Prohibit offensive posts meant to intentionally harm someone's reputation or that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy

DRAFTING A SOCIAL MEDIA POLICY

Keep NLRA rights in mind when drafting SM policies

Review by employment counsel/consultant



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