



FARELLA BRAUN + MARTEL LLP

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# EMPLOYER RESPONSE TO SOCIAL MEDIA AND THE WORKPLACE

Wine Industry Education Series

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big firm know how + small firm know you

# Investigating Employees and Job Applicants

- How many companies are monitoring social media to screen applicants or monitor employees?
  - 2009 Jump Start Social Media survey: 75% of hiring managers use LinkedIn to research job applicants; 48% use Facebook, 26% use Twitter.
  - 2008 American Management Association survey: 60% of employers monitor their workers' Internet connections and 30% have fired an employee for inappropriate Internet use.

# Investigating Employees & Job Applicants

- Why monitor and investigate?
  - Protect against poor hiring and retention decisions
    - May be a valid tool in investigating applicant's background
    - Potential vicarious liability for employee's actions
  - Investigate claims of illness, disability, or harassment

# Investigating Employees and Job Applicants

- Why monitor and investigate?
- Protect against reputational and business risks
  - Employees who post offensive or inappropriate content on social media.
  - Employees who may make critical or disparaging remarks about the company, their supervisors or coworkers, competitors, or their jobs
  - Employees who reveal confidential business information

# What Kinds of Activities Have Led to Employee Terminations?

- Posting photographs from legal, off-duty recreational activities



Drunken Pirate

# What Kinds of Activities Have Led to Employee Terminations?

- Membership in certain, “politically incorrect” social media groups.

**This is America, I shouldn't have to press 1 for English.**



Product/Service



# What Kinds of Activities Have Led to Employee Terminations?

- Other off-duty hobbies and activities.



# What Kinds of Activities Have Led to Employee Terminations?

- Disparaging posts on social networking sites



The screenshot shows a social media post and a reply. The post is from a user with a profile picture of a woman, and the text reads: "OMG I HATE MY JOB!! My boss is a total pervy wanker always making me do shit stuff just to piss me off!! WANKER! Yesterday at 18:03 · Comment · Like". The reply is from a user with a profile picture of a man, and the text reads: "Hi [redacted], i guess you forgot about adding me on here? Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that i'm gay? I know i don't prance around the office like a queen, but it's not exactly a secret. Thirdly, that 'shit stuff' is called your 'job', you know, what i pay you to do. But the fact that you seem able to fuck-up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, i'm serious. Yesterday at 22:53". Below the reply is a text input field with the placeholder text "Write a comment...".

 [redacted] OMG I HATE MY JOB!! My boss is a total pervy wanker always making me do shit stuff just to piss me off!! WANKER!  
Yesterday at 18:03 · Comment · Like

 Hi [redacted], i guess you forgot about adding me on here?  
Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that i'm gay? I know i don't prance around the office like a queen, but it's not exactly a secret. Thirdly, that 'shit stuff' is called your 'job', you know, what i pay you to do. But the fact that you seem able to fuck-up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, i'm serious.  
Yesterday at 22:53

Write a comment...



# Monitoring Social Media

- Issues can be further complicated by the intermingling of personal and professional profiles within an individual's social media site – often at the employer's encouragement
  - Blogs
  - Facebook sites
  - Twitter feeds
- Lines between personal and professional can be blurred
  - Published comments may be associated with the brand
  - Communications are written, spontaneous & permanent

# Legal Implications of Employee Social Media Use

- Regulation of Social Media Is Limited By Laws Regarding:
  - Background Checks
  - Off-Duty Conduct
  - Privacy
  - Anti-Harassment
  - Proprietary Information & Trade Secret
  - Anti-retaliation

# Background Checks: Fair Credit Reporting Act

- Scope of the Fair Credit Reporting Act (FCRA) and key definitions, 15 U.S.C. § 1681:
  - **The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness . . . character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected . . . the purpose of serving as a factor in establishing the consumer's eligibility for [employment.]”**

# Background Checks: The Fair Credit Reporting Act

- Scope of the Fair Credit Reporting Act (FCRA) and key definitions, 15 U.S.C. § 1681:
  - **“The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties . . .”**

# Background Checks: The Fair Credit Reporting Act

- Procedural Requirements for Using Consumer Reports:
  - Must provide written notice and receive individual's consent *before* requesting a consumer report from a consumer reporting agency
  - Must provide notice to individual *before* taking any adverse action based on information contained in a consumer report. Pre-adverse disclosure must include:
    - Copy of consumer report, and
    - Copy of FTC publication, "A Summary of Your Rights Under the Fair Credit Reporting Act."

# The Fair Credit Reporting Act

## Procedural Requirements for Use of Consumer Reports:

- Must provide notice to individual *after* taking any adverse action based on information contained in a consumer report.

Notice must include:

- Contact information of the CRA that supplied the report,
- Explanation that the CRA did not make the decision to take adverse action, and
- Notice of individual's right to dispute information in the report and request an additional free report within 60 days.

# The Fair Credit Reporting Act And Social Media Use

- Do services that use social media information fall within the scope of the FCRA?
  - Social Intelligence: Company runs “background checks” for companies via social media. After year-long investigation, FTC determined in May 2011 that company is a “consumer reporting agency” within the enforcement scope of the Fair Credit Reporting Act.
  - *Robins v. Spokeo*, No. CV10-05306 (C.D. Cal. 2011): Site that allows users to run simultaneous searches of individuals across 50+ social networking sites sued for violated of FCRA. Claim is pending after surviving a motion to dismiss on the issue of whether Spokeo is a “consumer reporting agency.”

# Robins v. Spokeo (CD Cal., May 11, 2011): Dismissal Denied

Spokeo People Search | White Pages | Find People

Join | Login

**spokeo**

NAME EMAIL PHONE USERNAME FRIENDS



**Enter a first and last name** Example: John Doe or Jane Doe, Los Angeles, CA

Not your grandma's white pages.





# *Robins v. Spokeo* (CD Cal., May 11, 2011): Dismissal Denied

- **Spokeo argued that it was an “interactive computer service” that “passively displays content that is created entirely by third parties.”**
- **Immune under the Communications Decency Act**
  - **“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c).**
- **Robins countered that Spokeo “develops original content based on information obtained from a variety of sources and posts it online[.]”**
- **“unlike information content providers that simply reorganize information obtained from other content providers“**
- **Court held that “allegations that Defendant regularly accepts money in exchange for reports that ‘contain data and evaluations regarding consumers’ economic wealth and creditworthiness are sufficient to support a plausible inference that [the] conduct falls within the FCRA.”**

# The Fair Credit Reporting Act And Social Media Use

- Key points:
  - The law is still catching up with technology. The scope of the FCRA may be expanding over the next several years.
  - Social media content can be considered consumer information for the purposes of the FCRA.
  - To the extent that employers use third-party services to conduct background checks through social media, they should observe proper notice and consent procedures under the FCRA.

# Investigating And Monitoring: Anti-discrimination Laws

Federal and state laws prohibit employers from taking adverse employment action against an employee or failing to hire an applicant because of that employee's membership in a protected class

Statute	Protected Class(es)
Civil Rights Act of 1964, Title VII	Race, Color, Religion, Sex, National Origin, Pregnancy
Americans with Disabilities Act	Disability
Genetic Information Nondiscrimination Act	Genetic information
Age Discrimination in Employment Act	Age
California Fair Employment and Housing Act (FEHA)	Age, <b>Ancestry</b> , Color, Religion, Disability, <b>Marital Status</b> , <b>Medical Conditions</b> and Genetic Characteristics, National Origin, Race, Sex, <b>Sexual Orientation</b>

# Investigating And Monitoring: Anti-discrimination Laws And Social Media Use

## Potential risks of liability:

- Job applicants who claim that an employer discovered and relied on impermissible factors in failing to hire them.
- Employees who claim that an employer selectively enforces its policies in a discriminatory manner.
  - *Simonetti v. Delta Air Lines*, No. 1:05-CV-2321 (N.D. Ga. Sep. 7, 2005): Female employee fired for “inappropriate” photographs of herself in uniform posted on personal blog sued for gender discrimination, claiming that male employees who posted photographs of themselves in uniform were not terminated.

# Anti-Harassment Laws

- Private social media postings can create hostile environment for employees
  - Reveals otherwise private thoughts of the author
  - Widely disseminated – potentially among workforce
- Creates potential conflict within workplace
- Postings may be occurring or accessed
  - During work time, or
  - On work computers
- Employer will generally be viewed as having a legitimate interest in regulating

# National Labor Relations Act: Protection Of Concerted Activities

- **29 U.S.C. 157 (“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
- **29 U.S.C. 158 (“Section 8”)**: (a) It shall be an unfair labor practice for an employer - (1) **to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title**[.]

# National Labor Relations Act: What Activities Are Protected?

- Protected, concerted activities include comments and discussions relating to:
  - Terms or conditions of employment
  - Wages
  - Workload and staffing issues
  - Workplace safety issues
- NLRB Hartford Regional Director:
  - “It doesn’t take much to establish the concerted nature of the discussion, so long as it involve[s] or touche[s] upon a term or condition of employment”
  - “anything short of physically threatening activity will likely be protected.”

# National Labor Relations Act: What Activities Are Protected?

- Non-protected activities include:
  - Any illegal activities
  - Publication of trade secrets or other confidential business information
  - Obscenity, profanity, and hate speech
  - Malicious or defamatory remarks that the speaker knows are untrue
  - Comments unrelated to employment
- Employers may not prohibit or chill employees from exercising Section 7 rights or retaliate against them for doing so.
  - Even employer surveillance or giving the impression of surveillance may be construed as chilling employee behavior.



# National Labor Relations Board (NLRB): Foundational Case

Sears Holdings Roebucks (Decided December 2009):

- Sears' policy prohibited discussion of the following materials in any form of social media:
  - Confidential or proprietary information of company, clients, partners, vendors, and suppliers
  - Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects
  - Explicit sexual references, reference to illegal drugs, obscenity or profanity
  - Disparagement of any race, religion, gender, sexual orientation, disability or national origin.
- Held: No employee could reasonably construe the policy to prohibit protected activities, since there were sufficient examples indicating that it only applied to "online sharing of confidential intellectual property" or "egregiously inappropriate language."

# National Labor Relations Board (NLRB): Recent Cases

American Medical Response (filed Oct 2010).

- Employer refused employee's request for union representation during an investigatory meeting regarding a customer complaint.
- Employee complained on Facebook, calling her boss a "scumbag" and other derogatory words.
- Employer terminated her pursuant to social media policy that prohibited employees from making any disparaging comments regarding company.
- Case settled, with employer agreeing to revise its "overly-broad" social media policy.

# National Labor Relations Board (NLRB): Recent Cases

## Thomson Reuters (April 2011)

- Supervisor invited employees to send postings about how to make Reuters the best place to work.
  - Employee posted a Twitter response stating “One way to make this the best place to work is to deal honestly with Guild members.”
  - Supervisor called employee to tell her that the company had a policy against employee statements that would damage the reputation of Reuters or Thomson Reuters.
- Parties reached a tentative settlement prior to the NLRB’s filing of a complaint against employer.

# National Labor Relations Board (NLRB): Recent Cases

## Hispanics United (filed May 2011)

- Employee #1 posted on Facebook, criticizing her organization for providing ineffective services to clients.
  - Employees #2-5 responded, defending themselves by citing heavy workloads and staffing issues.
  - Employer terminated Employees #2-5 for “harassment.”
- NLRB held that terminations were retaliation
  - Employees were discussing working conditions among themselves
  - Partially in anticipation that Employee #1 would be raising these issues with management

# National Labor Relations Board (NLRB): Recent Cases

## Knauz BMW (filed May 2011)

- Employee posted photographs and critical comments regarding food and beverages served at employer's customer appreciation event.
  - Other coworkers joined in, discussing how marketing tactics would affect their sales commissions.
  - Employee removed the photographs and comments at employer's request, but continued to post other photographs of an accident during co-worker's test drive with a customer.
  - Employee was terminated one week later.

## Held

- Comments regarding event were protected.
- Termination upheld due to accident posting.

# Lessons Learned From Recent NLRB Cases

- NLRB is treating social networking sites as the new “digital” water cooler, even though discussions between employees on these sites may be visible to the Internet public at large.
- Even comments and discussions that do not appear to be related to mutual aid or protection of employees may be the subject of an NLRB complaint if related to employment.
- Employees who make disparaging remarks arguably may be engaging in protected speech if their comments are related to the terms and conditions of their employment.
- Employers who reprimand their employees for airing workplace grievances may, in some circumstances, also be subject to an NLRB complaint.

# National Labor Relations Act

- On its Facebook page, the NLRB has announced a four-part test to determine whether a social media posting loses its protected status under Section 7:



## National Labor Relations Board



What's the line? When do Facebook comments lose protected concerted activity status under the National Labor Relations Act? A four point test applies: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

November 9, 2010 at 12:23pm · [Like](#) · [Comment](#)

# Other Protections For Employee Activities

- **Political speech:** California Labor Code section 1101 prohibits employers from interfering with or retaliating against an employee's off-duty political activities.
- **Federal and state anti-retaliation statutes:** Employees who post or blog about harassment, discrimination, or other illegal treatment in the workplace may be protected from retaliation by employer.



# Investigating And Monitoring: Privacy And Defamation Laws

## **Stored Communications Act (SCA):**

Assesses criminal penalties on anyone who “(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.”

# Investigating And Monitoring: Privacy And Defamation Laws

## Stored Communications Act Cases:

- *Konop v. Hawaiian Airlines*, 302 F. 3d 868 (9th Cir. 2002): Possible violation of SCA where company executive created unauthorized user account to gain access to an employee's personal, members-only website.
- *Pietrylo v. Hillstone Restaurant Group*, No. 2:06-cv-05754 (D.N.J. Sept. 25, 2009): Upholding jury verdict finding violation of SCA where employer pressured employee to provide her user name and password to members-only MySpace group.

# Investigating And Monitoring: Privacy And Defamation Laws

- State law protections:
  - Invasion of privacy
  - Defamation
- Illustrative cases for guidance:
  - *Lawlor v. North American Corp.*: Employer liable for invasion of privacy after obtaining private phone records through pretextual means.
  - *Socorro v. IMI Data Search, Inc.*, No. 02 C 8120, 2003 WL 1964269, (N.D.Ill., Apr 28, 2003): Job applicant successfully stated claims for defamation and false light invasion of privacy after employer acted on erroneous background check by denying him employment and telling others that he was an ex-convict.

# Investigating And Monitoring: Privacy And Defamation Laws

- Key Points:
  - Don't seek unauthorized access to information or engage in pretexting.
  - Keep in mind that information obtained through social media may be inaccurate, incomplete, or misleading.
  - Maintain confidentiality when investigating and monitoring social media use and discussing findings.

# Handling Specific Incidents Of Social Media Misuse

- Talk to employees to clear up any misunderstandings or address issues that can be resolved without resorting to disciplinary measures.
  - Considering giving warnings before taking adverse employment actions.
  - If appropriate under the circumstances, request that employee remove the postings or content at issue.
  - If employee has grievance relating to harassment or discrimination, encourage employee to pursue appropriate internal channels for resolving the matter.
- In certain instances, however, asking employees not to engage in public speech may be construed as chilling protected activities.
- If the employee refuses to take down the content, then consult with a lawyer to explore disciplinary action.

# Handling Specific Incidents Of Social Media Misuse

- Be mindful of protected speech and activities.
  - Discussions about wages, workload, workplace safety, terms and conditions of employment
  - Off-duty political activities (California)

# Investigating And Monitoring: Antidiscrimination Laws And Social Media Use

- Recommendations to avoid liability:
  - Segregate functions and filter out irrelevant, protected information
  - Maintain consistency in applying company policies
  - Document reasons for taking any adverse employment action

# Employee Use Of Social Media: Policies Clarifying Appropriate Professional Use

**A Social Media Policy should provide guidelines for employees who use social media for work purposes:**

- **Requiring management review and approval before launching any internet initiative**
  - **How much review of each posting??**
- **Requiring management review and approval before posting any images of Company facilities, events or employees**
- **Prohibiting posting content that would disclosure confidential information of the employer, customers, or business partners**
- **Requiring that any postings be respectful of customers, affiliates, competitors or co-workers**
- **Directing the use of caution, discretion, and good judgment when deciding what kinds of information and content to post to social media.**



# Employee Use Of Social Media: Policies Concerning Personal Use

A Social Media Policy should also provide guidelines for employees who use social media for **personal** purposes:

- All personal use of social media must:
  - occur through a personal account;
  - not appear to represent the Employer;
  - not use Employer's trademarks;
  - make it clear to readers that the views expressed are yours alone
    - This may require a disclaimer depending upon the context

# Employee Use Of Social Media: Policies Concerning **Personal** Use

## All personal use of social media must (con't):

- not disparage business affiliates, competitors or customers
  - Eg, Customer Rep criticizes customer on Facebook
  - Eg, Employee rebuts negative posting
- not contain any confidential information relating to the Employer, its customers, or its business partners;
  - Eg, no Twittering updates from internal meetings
- not reproduce company material without permission;
- comply with general company policies, such as
  - Business Ethics Code
  - Confidential Information Policy
  - Anti-Harassment Policies

# Employee Use Of Social Media: Policies Concerning **Personal** Use

## Images

- Any photos in Employer facilities may only be used if approved
- Ask permission from colleagues before including them

## “Friends”

- “Conduct yourself with co-workers as you would in the office”
- Prohibit friending subordinates?

# Employee Use Of Social Media: Policies Concerning **Personal** Use

## Additional provisions:

- “Please be aware that we may request that you temporarily confine your website or weblog commentary to topics unrelated to the company . . . if we believe this is necessary or advisable to ensure compliance with securities regulations or other laws.”
- “Please consult with Human Resources if they have questions about what they can and cannot share through social media.”
- “This policy is not intended to preclude employees from exercising their right to engage in lawful collective activity as provided by state and federal law.”

## Employee Use Of Social Media: Policies Concerning **Personal** Use

Encourage employees to raise their self-awareness thru regularly:

- reviewing their social media profiles and previous postings,
- monitoring their privacy settings, and
- searching the web for content posted by others.



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