

Social Media and Employment Law: Key Issues Employers Face Today

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Worker Safety, Labor and Employment
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Presented By:

Jeffrey I. Pasek

(215) 665-2072

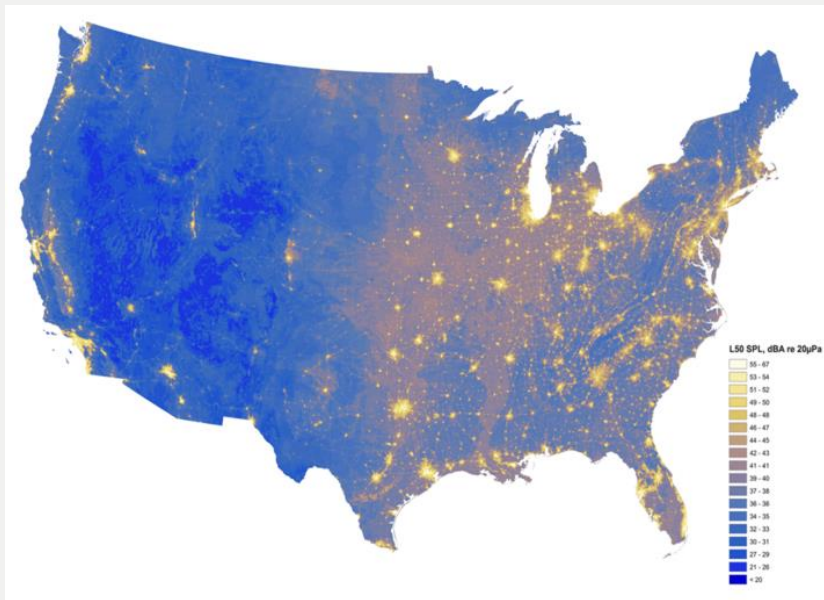
jpasek@cozen.com

We Can't Un-Ring The Bell

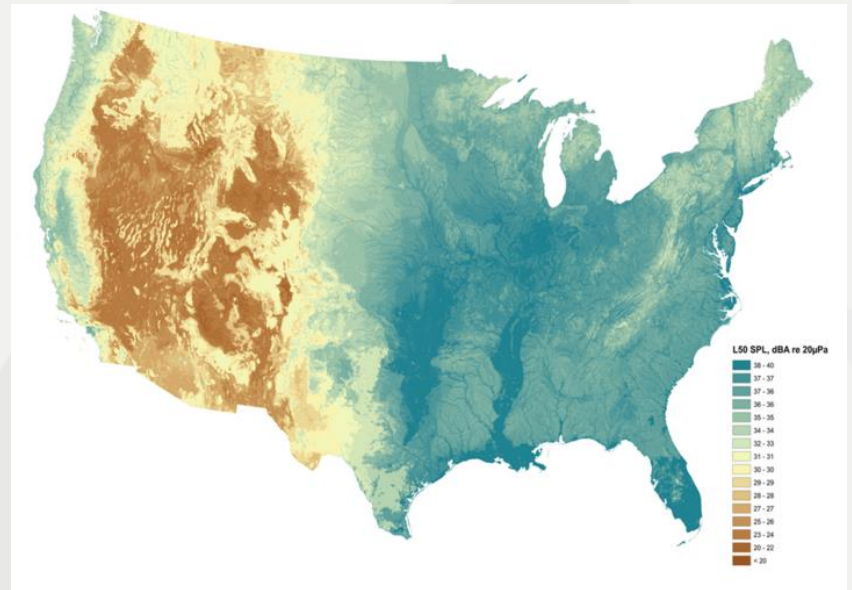


Where do you live?

Where you live by Sound



Where you live by Topography



Where do you live?

“We Used To Live On Farms, Then In Cities . . . Now We’re All Living On The Internet.”

“The Social Network”



Social Networking – It's Here to Stay



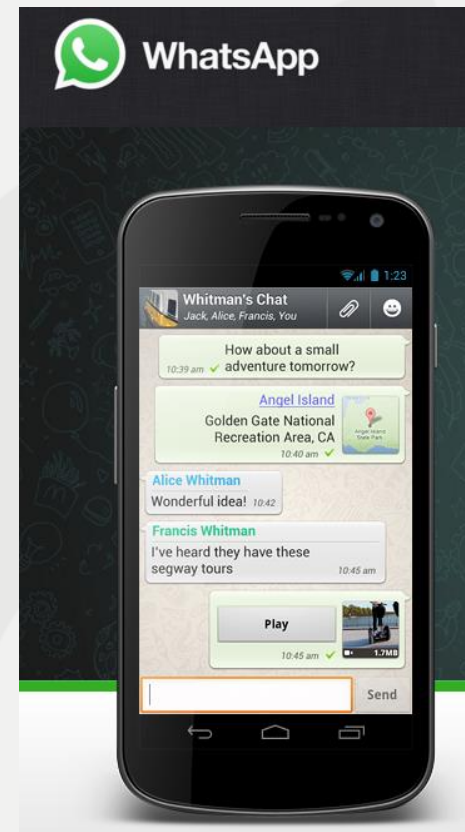
- **Facebook** had more than 1.59 billion monthly active users as of December 31, 2015
 - If **Facebook** were a country, it would be the most populated country in the world
- **LinkedIn** had 414 million users (updated 2/4/16)
 - Approximately 2 new members joining every second
- **Twitter** has 320 million monthly active users (updated 12/31/15)
 - Sending 9,100 tweets per second

New Platforms Emerge

Other Social Media Networks with more than 100 Million Users

- QQ
- Qzone
- WeChat
- Tumblr
- Instagram
- Baidu Tieba
- Skype
- Viber
- Sina Weibo
- LINE
- Snapchat

Since it was Founded in 2009 it grew to 900 Million Users by September 2015



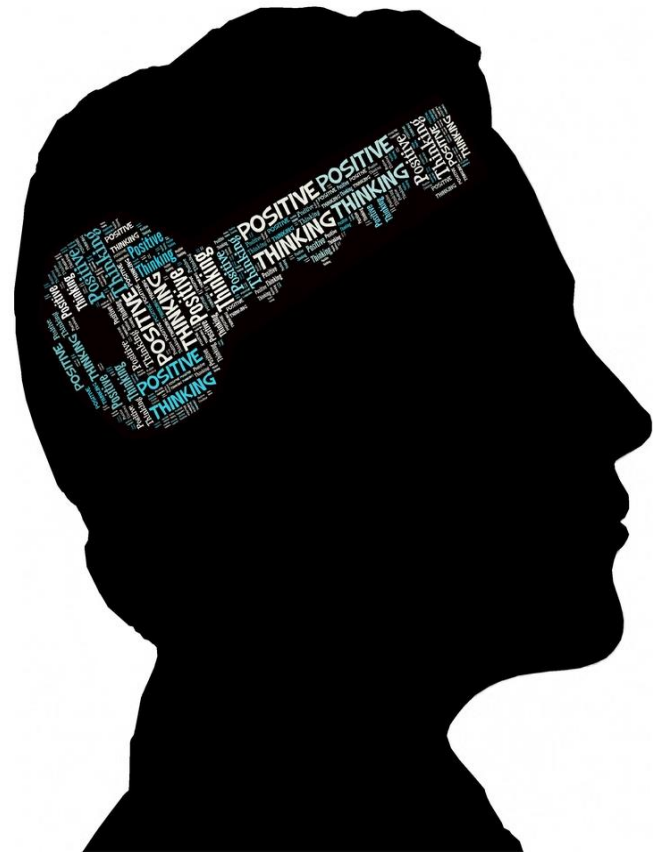
Truisms

- #1 – There has been a dramatic rise in employee use of social media.
- #2 – There has been a dramatic rise in employer use of social media.

The Legal/Business Mindset

Understanding The Realities

- Reality of Technology and Social Media in 2016
- Reality of the 2016 Workplace
- Reality of the 2016 Workforce



What Is The Company Approach?

1. Active Adopter (Require Participation)
2. This is Kinda Neat! (Encourage Participation)
3. If You Can't Beat Them, Join Them (Tolerate it Grudgingly)
4. Social Media Does Not Belong in Workplace (Ban It All!)
5. The Ostrich Approach (We Don't Need a Policy)

#1

**Traditional Employment
Claims = Social Media Claims**

Traditional Claims = New Social Media Claims

- Defamation and workplace torts...
- Union organizing
- Discrimination
- FMLA/ADA...
- Religious Accommodation...
- Wage & Hour
- GINA...

2

Harassment and Discrimination

STEREOTYPES TEASING

Jokes

Honey, Girl

Grandpa

INNUENDO

Sexual Harassment – Hostile Environment

To establish a sexually hostile environment under federal law, the conduct or statements must:

- be because of gender,
- be unwelcomed,
- be severe or pervasive, and
- substantially affect the victim's ability to perform his or her job.

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Faragher/Ellerth Defense

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Faragher/Ellerth Defense

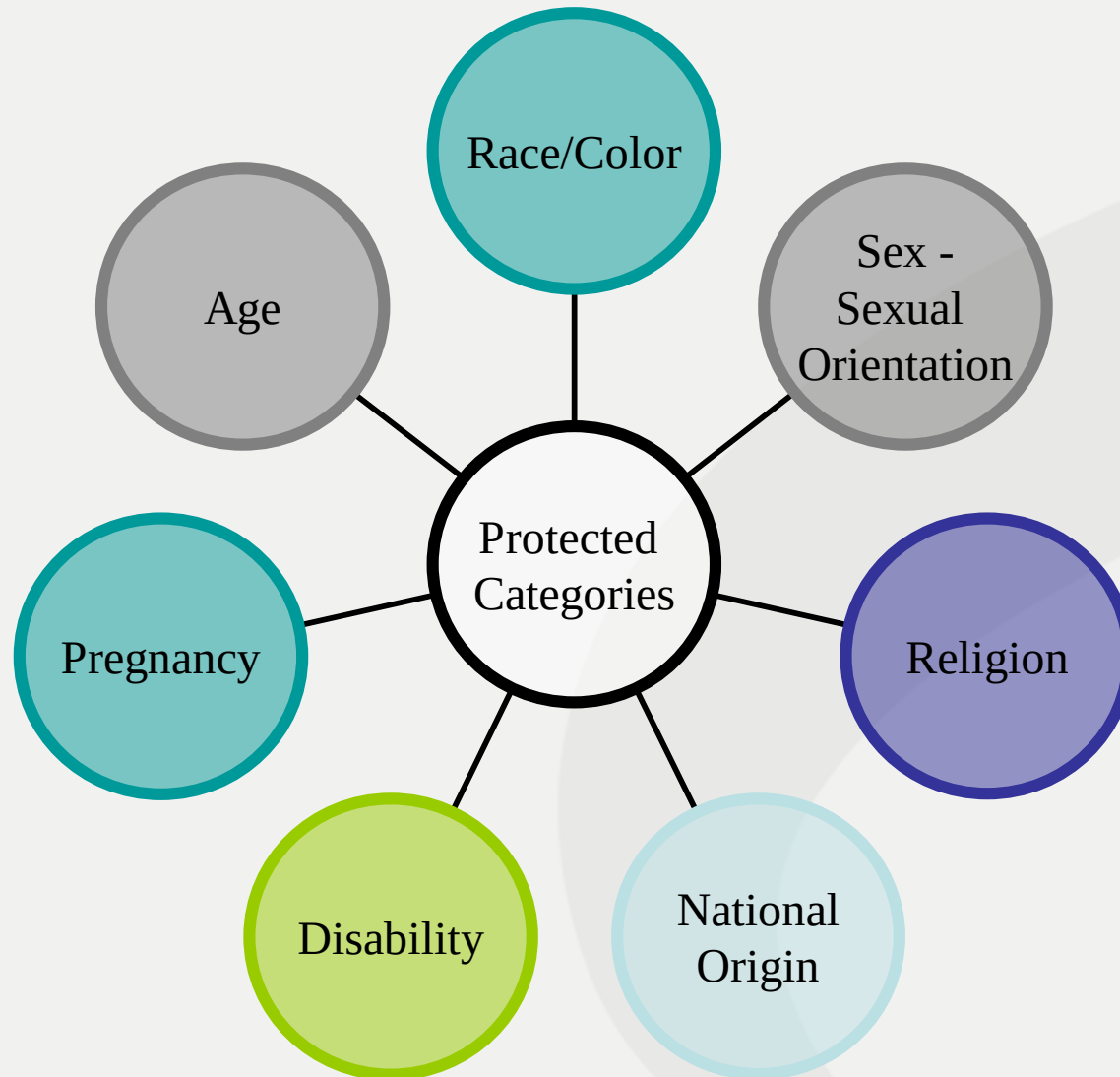
- But some jurisdictions have lower thresholds

Sexual Harassment – *Quid Pro Quo*

Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission is made a term or condition of an individual's employment, or
- submission to or rejection of such conduct is used as the basis for employment decisions affecting the individual, or
- the individual fears it will be used against him or her.

A Fluid and Growing List



Trending Upward and Outward

- Military Veterans
- Transsexual Status
- Domestic Partnership/Abuse
- Employment/Unemployment Status
- Credit History
- Criminal Convictions

Old Claims → Textual Harassment

‘omg, u look gr8’

“[T]ext messaging is the most revealing of the true thoughts — the unrestrained thoughts — of the harasser....They bang it out real quick, late at night, after a couple glasses of wine. They don't think twice about it. And they make big mistakes...”

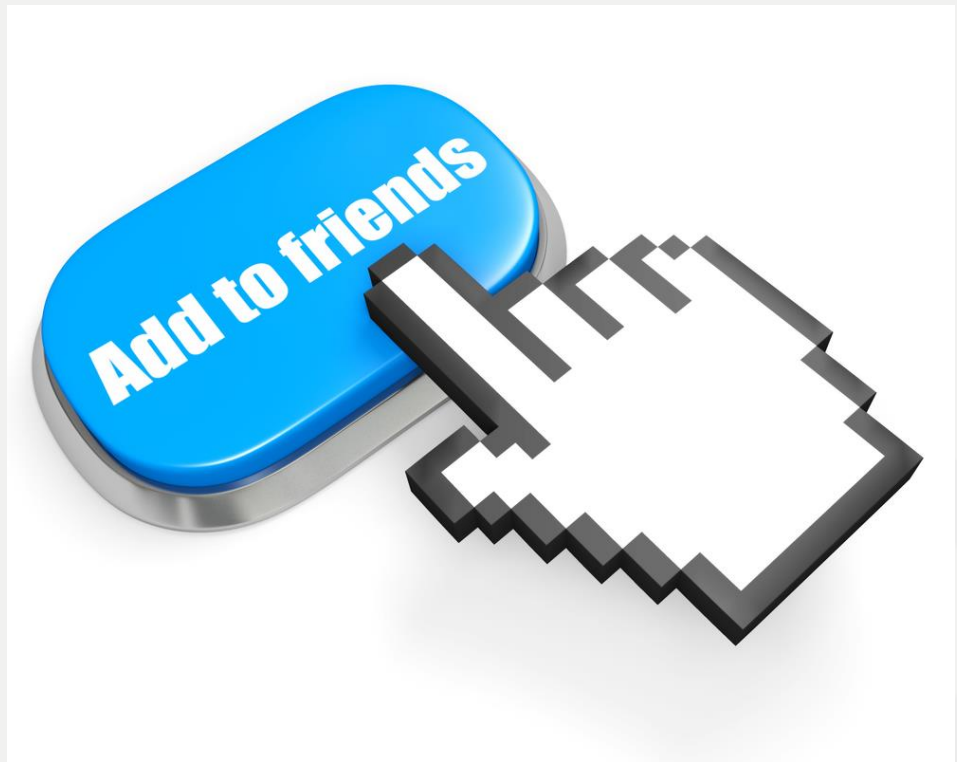
“Textual Harassment’ on the Rise,”

The National Law Journal, July 20, 2009

Cyber Bullying



The Perils of “Friending” and Online Relationships



What If?

Office Casanova chronicles, on his own time, opinions of female co-workers he dates on Facebook, calling one co-worker, without naming her, "a snore" before the updates spiral into more explicit comments?

- A female co-worker believes he's talking about her and complains.**

What If?

Co-workers form Facebook group to gossip negatively about another co-worker?

- or their manager?**
- or some minority group at work?**

What If?

- ☐ A white manager is only “friends” with white employees in the department?
- ☐ A male supervisor has a history of being “friends” with attractive single women in the office?
- ☐ An employee gets upset because a supervisor won’t be “friends” with him or her – and claims it is discrimination?

The Mindset

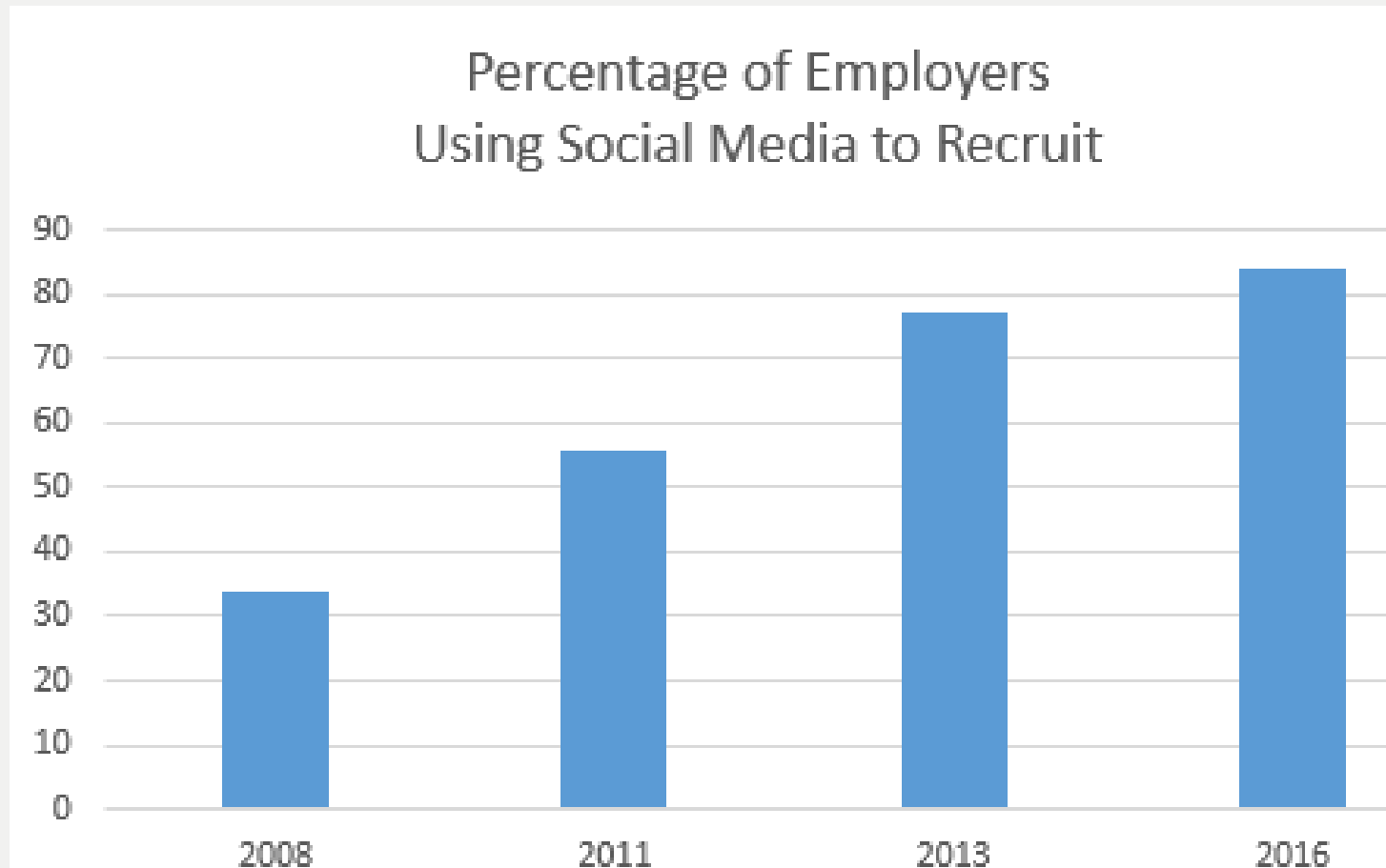
Consider Limiting:

- **Management “friending” subordinates on Facebook, or anyone within line of supervision;**
- **Suggest separation between personal and business access for “friends” on Facebook.**

#3

**Non-Traditional
Opportunities and Risks
Social Media Presents for HR**

Social Media in Recruiting



Source: SHRM survey data

Social Media in Recruiting

- Popular social media sources used to recruit
 - LinkedIn
 - 96%
 - Facebook
 - 66%
 - Twitter
 - 53%
 - Professional or association networking site
 - 35%
 - YouTube
 - 11%

Social Media in Recruiting

- **Efficiency** (measured by the time to fill a position)
 - Upper Level Management – C-Suite
 - 59%
 - Management – Directors/Managers
 - 67%
 - Salaried Non-Management
 - 71%
 - Hourly Non-Management
 - 53%

Social Media in Recruiting

➤ **Quality** (Survey response: Very effective in meets performance needs of the job)

➤ Upper Level Management – C-Suite

➤ 20%

➤ Management – Directors/Managers

➤ 22%

➤ Salaried Non-Management

➤ 22%

➤ Hourly Non-Management

➤ 14%

Social Media in Recruiting

- Sophisticated Targeting
 - Leverage mobile recruiting
 - Examples include:
 - Optimizing web sites
 - 39%
 - Job postings
 - 36%
 - Application process
 - 36%
 - Career website prominent on homepage
 - 35%

Social Media in De-Recruiting

Using Social Media to Weed Out Applicants

- 43% of organizations responding to a SHRM survey said they use social media or online search engines to screen job candidates
- 44% of the HR professionals agreed that a candidates public social media profile can provide information about work related performance
- 36% of organizations have disqualified a job applicant in the past year because of information found on a public social medial profile or through an online search
 - Illegal activity
 - Discrepancies from the application
- 39% of organizations allow candidates to explain away what is discovered online

Among Those Not Using Social Media to Recruit

- 46% of organizations reported concerns about legal risks
- 46% of organizations reported not enough HR Staff time

State Laws on Employer Access to Social Media

- Many states have passed laws prohibiting employers from seeking information about employees' and prospective employees' personal social media accounts
- Examples of prohibited conduct include:
 - requesting or requiring that an employee or applicant disclose any user name, password, or other means to access a personal account
 - discharging, disciplining, or otherwise penalizing (or threatening to do so) an employee for refusing to disclose the specified information
 - Requiring an employee or applicant to “friend” another employee, supervisor or administrator to the account's contact list

State Law Restrictions

The following states have passed laws regarding employer access to current and prospective employees' personal social media accounts:

Arkansas
California
Colorado
Connecticut
Delaware
Illinois
Louisiana
Maine
Maryland
Michigan
Montana
Nevada

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

The Mindset

- For *all* recruitment methods used, rely on objective criteria set forth in a job description before the online search begins.
- Consider using non-decisionmaker or outside agency to screen out legally risky information.
- Document clear reasons for a candidate's rejection that are consistent with the job description.
- If using video resumes, follow uniform procedures for the selection of videos to be viewed.
- Develop, communicate and enforce clear policies with respect to the purposes for which social networks, blogs and the like may be mined for data about job candidates

Other Minefields to Avoid

4

The NLRB and Protected Concerted Activity



October 2010 – Where it began



NLRB

National Labor Relations Board

Facts: A Teamsters member for a Connecticut ambulance service posted negative comments about her supervisor on her Facebook page. Other coworkers posted support for her comments, which led to more negative comments about the supervisor. The Teamsters member was fired.

Filing: The NLRB issued a Complaint alleging that the employee was terminated for making comments in violation of a policy prohibiting public statements which are derogatory against the employer.

This case settled in February 2011, but the door was opened...

The NLRB Speaks. . .

Reports of the Acting General Counsel Concerning Social Media Cases August 18, 2011; January 24, 2012

STEP #1 – Were the postings “concerted” activity?

- “Concerted” → When employee acts with or on the authority of other employees, and not solely by and on behalf of the employee himself or herself.
- “Concerted” → When employee seeks to initiate or to induce or to prepare for group action.

. . .The NLRB Speaks . . .

STEP #2 – If yes to #1, was the employee engaged in “protected” concerted activity?

- Typically clear from the context of the statements, or the face of the statements, that they implicated working conditions.

STEP #3 – If yes to #1 and #2, did the employee lose the Act’s protection?

- Typically applied to an employee who makes egregious, obscene or disparaging comments about the employer or products so that the statement is so disloyal, reckless, or maliciously untrue as to lose protection.

. . . The NLRB Speaks

- ✓ Don't make policy too broad or contain language that tends to chill employees in the exercise of their legal rights.
- ✓ Don't make policy that lacks definitions or guidance as to what is covered under the policy, so that it could be interpreted to prohibit protected concerted activity.
- ✓ Do consider putting in “catch-all” statements:
 1. Nothing in the policy is intended to chill employee rights under the law.
 2. Any conflict between policy language and the current state of relevant law will be decided in favor of the law.
 3. Don't hide them.

Recent Examples

- **Chipotle Services LLC (March 14, 2016):** An Administrative Law Judge ruled that Chipotle Services LLC violated the National Labor Relations Act by forcing an employees at a Chipotle Mexican Grill restaurant in Havertown, PA to delete (pursuant to the company's social media code of conduct) from his Twitter account tweets that were critical of certain employment conditions and practices.
- **Yelp/East 24:** On February 19, 2016, an employee calling herself "Talia Jane" posted an open letter on [www.medium.com](https://medium.com/@talijane/an-open-letter-to-my-ceo-21e7a#gldcj9wkc) to the CEO decrying her low salary and other working conditions. She reported that she was fired within hours.
 <https://medium.com/@talijane/an-open-letter-to-my-ceo-21e7a#gldcj9wkc>. Her post drew as of 4/2/16. Whether a ULP charge will be filed remains to be seen.

5

Trade Secrets, Proprietary Information and Anti-Competition



Whose Account Is It Anyway?

➤ *PhoneDog v. Kravitz* (No. 11-03474 N.D. Cal.)

- Trial court ruled that Twitter passwords and follower lists could constitute trade secrets, but case was settled on a confidential basis in January of 2013, but Kravitz continues to use the Twitter handle @noahkravitz

➤ *Eagle v. Morgan* (No. 2013-11-4303 E.D. Pa.)

- After selling the company, the founder and former CEO of Edcomm sued the company and various individuals for taking over her LinkedIn account and changing the password. Although ruling this did not violate the Computer Fraud and Abuse Act, the court held that it constituted unauthorized use of her name, invasion of privacy, and misappropriation of publicity.

The Mindset

- Information published on blogs or through social networking sites should comply with the company's confidentiality and proprietary data policies as well as applicable copyright and trademark laws.
- All non disclosure and confidentiality agreements should be updated to include social media.
- Consider insider trading or anti-trust implications of information posted on social media sites.
- Be specific in terms of ownership and definitional issues

It's A Brave New World

- The Take Away
 - Social Media has become such a part of our lives that every organization must develop effective strategies to reap its advantages and protect itself from the risks
 - In the world of HR
 - New recruiting tools
 - Old claims will appear in new forms
 - Proactive steps can limit the risks



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