



the social headache

Presented by:
Lawrence Morales II



Employment Law & Social Media



Relevance of Social Media



300 MM People in U.S.

845 MM Facebook Users

12.7% of U.S. Internet Time Spent on FB

425 MM Users Worldwide Access via Mobile Devices

Relevance of Social Media



RESIGNED ON FEBRUARY 9, 2011

Relevance of Social Media



RESIGNED ON JUNE 16, 2011

Relevance of Social Media

Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.



3:17 AM Mar 18th from web

haynes
Setting pr



Relevance of Social Media

-----Original Message-----

From: Kevin Colvin [mailto:kevin.colvin@nyu.edu]

Sent: Wednesday, October 31, 2007 3:55 PM

To: Jill Thompson (North America)

Cc: Paul Davis (North America)

Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

From: Paul Davis (North America)

Sent: Thursday, November 01, 2007 4:54 PM

To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)

Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,

PCD



Relevance of Social Media

facebook



Relevance of Social Media

Spokeo.com



corporate presence on social networks



Pros

- Increased exposure, traffic and popularity
- Can create and leverage a powerful marketing and public relations machine
- Greater awareness of public's perception of one's products and services

Cons

- Potential for issuing public statements that are impossible to retract/expunge
- “Official” statements may not represent company's position
- Potential publicity headaches or undermining of brand
- Employer can be held liable for the activities of its employees



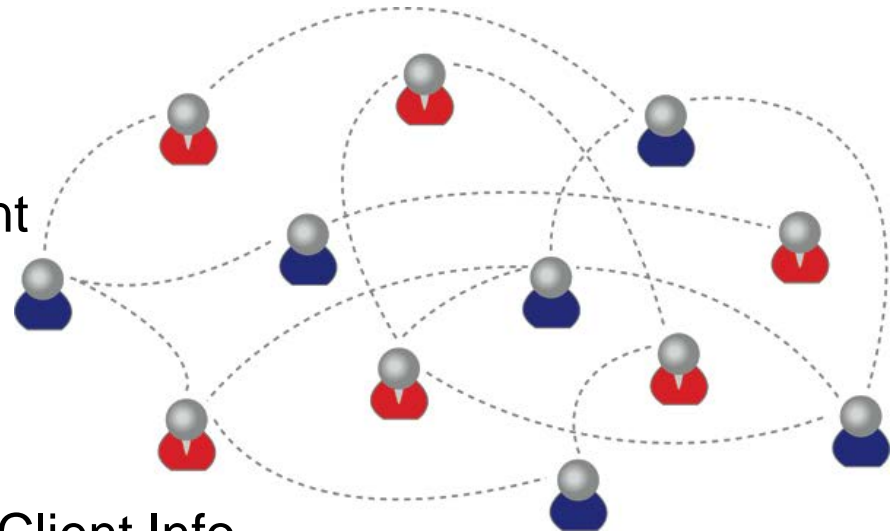
intersection of social media and employment law

- 2 Major Concerns for Businesses
 - 1) Business and Legal Risks from Employee Use of Social Media
 - 2) Legal Risks of Firing or Disciplining Employees for Using Social Media



employee use of social media

- Offending Customers/Clients
- Negative Publicity
- Defamation
- Intellectual Property Infringement
- Trade Secret Disclosure
- Criminal Assault
- Concerted Activity
- Fraud
- Disclosure of Private Customer/Client Info
- Non-Compete/Non-Solicitation
- Invasion of Privacy Torts
- Securities Law Claims
- Harassment/Intentional Infliction of Emotional Distress
- Tortious Interference with Existing or Prospective Contract



unwanted branding



- YouTube video surfaced of Domino's Pizza employees stuffing cheese in their noses -- *before* placing the cheese on the pizza



haynesboon
Setting precedent.

defamation

- **What is legal defamation?**
 - **Varies from state-to-state**
 - **In Texas,**
 - **publication of a statement**
 - **the statement was defamatory**
 - **the “speaker” was at least negligent with respect to the truth or falsity of the statement**
- **If you are posting about other people, be truthful**



linkedin issues

- **Non-Compete/Non-Solicit**
 - Recommendations
 - Direct Solicitation
 - Stealing Clients
- **Terminations**
 - Discrimination Claims
 - Just Cause Terminations



Haynes Boone
Setting precedent.

securities violations

- **Inappropriate insider trading**
 - What is “material nonpublic” information?
 - Information is “material” if a reasonable investor would consider it important in making an investment decision.
 - Information is “nonpublic” if it has not been disseminated in a manner making it available to investors generally for at least two trading days.
 - Recipients of material nonpublic information who receive such information improperly from insiders are “tippees.”
 - Insiders who provide material nonpublic information to tippees may be held responsible for the trading of their tippees.
- **SEC might come calling.**



Setting precedent.

securities violations

- CEO anonymously posts damaging confidential information regarding company it was acquiring
- FTC filed a complaint and Company had to sell 13 stores as part of the settlement of claim



"Psst! If you have any stock tips to pass on, I can probably lighten your sentence for insider trading."

haynes
Setting precedent.

potential harassment

- Supervisors “friending” subordinates and subsequently sharing too much personal information
- Facebook posts of an employee chronicling his dates with co-workers
- “Poking”
- Sharing inappropriate videos or pictures
- Facebook stalking

Confirm



Haynesboon
Setting precedent.

firing employees for use of social media

- Off-Duty Conduct Laws
- Retaliation
- Whistleblowing
- Discrimination
- Concerted Activity
- Invasion of Privacy
- Stored Communications Act/Wiretap Act



off-duty conduct laws

- Some states (IL, CA, NY, CO, ND) have enacted broad off-duty conduct laws
- Protections for:
 - Off-Duty Conduct
 - Off-Site Legal Activities
- Potential Causes of Action
 - Fired for Blogging
 - Fired for off-duty activity tweeted about or posted on Facebook profile
 - Fired for pictures on Flickr account
- Statutory exceptions provide defenses



HaynesSource
Setting precedent.

off-duty conduct examples

- Criminal Defense Attorney in Las Vegas fired for listing “breaking my foot off in a prosecutor’s ass” as one of his interests on Facebook
- Texas teacher fired for posting topless photos of herself on Flickr
- In England, prison officer fired for having several former and current inmates as Facebook friends
- Employee fired for posting on Facebook that her job was “boring”

boymesh.com
Setting precedent.

retaliation

- Blog posts, status updates, other comments that could be construed as complaints
- If complaints can be linked to protected activity (i.e., complaining regarding pay, discrimination) potential cause of action if employer fires or disciplines employee
- Public employers must also be conscious of 1983 retaliation, prohibiting retaliation for exercising constitutionally protected rights

haynesboone
Setting precedent.



retaliation examples

- Woman claimed she was retaliated against because she reported employee showing racially insensitive YouTube videos to other employees
- Woman claimed she was retaliated against when employer fired her after it discovered her in a YouTube video protesting the Iraq war
- Public school employees claimed retaliation for exercising 1st Amendment rights in blogging
- Teacher claimed retaliation for exercising 1st Amendment right to communicate with students over MySpace

Setting precedent.

whistleblowing

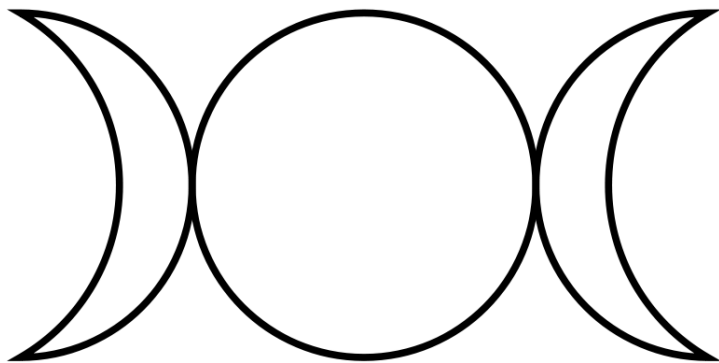
- Some statutes protect employees from discipline or termination when employee reports violations of the statute (SOX is one example)
- Again, employee that posts blog, tweets, chronicles issue on video posted to YouTube could have cause of action if the communications can be construed as whistleblowing
- Oftentimes, these statutes require reporting to a government agency, thus, social media type postings may not protect an employee



haynesboone
Setting precedent.

discrimination examples

- Flight Attendant fired for posting inappropriate photos of her in a Delta plane in her uniform on her blog – claimed men were not fired for similar reasons



Employee claimed he was fired after employer discovered that he was a practicing Wiccan on his MySpace page

protected concerted activity

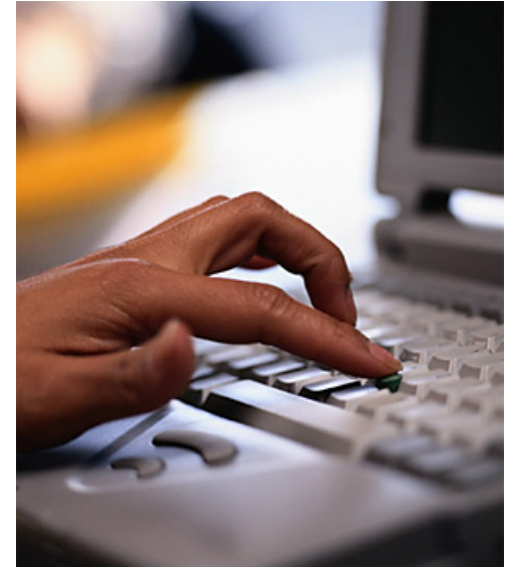
- Employee's internet postings could reflect an effort to unionize or relate to a dispute between the employer and employee over terms and conditions of employment
- Employee speech is not always protected if it is disloyal or disparaging



haynesboo
Setting precedent.

invasion of privacy

- In the termination setting, an employee could argue that an employer invaded his/her privacy in accessing social media posts and using that information to terminate the employee
- These claims likely fail because it is difficult to credibly argue that the employee had an expectation of privacy in a post voluntarily communicated on the internet



Setting precedent.

regulating social media usage

- Employers should consider an Internet Usage Policy that establishes rules for social media
- Preference is to have a stand alone policy that integrates other policies
- Important to make sure that employees receive and understand policy – perhaps a separate acknowledgement of the social media policy is appropriate
- Consistent enforcement is something to take into account – once policy is in place, steps must be taken to enforce it
- Inconsistent enforcement reduces the policy's utility in combating employee claims



haynesbo **P O L I C I E S**
Setting precedent.

social media policy

- Things to Consider
 - Setting out that there is no expectation of privacy on Company owned/issued equipment
 - Information and data transmitted on Company-owned/issued equipment may be monitored
 - No personal usage of Company property (consider if this is desirable/achievable)
 - Communications on Company-owned equipment are property of Company
 - No access to Facebook, etc. on Company equipment (again, ask if this is feasible)
 - Company logos/trademarks cannot be used without permission
 - Official company blogs can only be used to add value to Company
 - Requiring disclaimer if employee writes about Company products and/or services stating that views are personal and do not represent official views of Company
 - Can only officially represent Company if authorized to do so



Setting precedent.

social media policy

- Things to Consider
 - Employee posts must be respectful to Company, other employees, customers, clients, and competitors
 - Employee must comply with confidentiality and disclosure of proprietary data policies
 - Blogging should not interfere with work commitments
 - Consult manager if unsure if posts or activities are in compliance with policy
 - Avoid postings that put Company in negative light
 - Be mindful of potentially illegal conduct – invasion of privacy, securities laws, defamation
 - Avoid posting information about Company's future performance or worth
 - Report violations to HR
 - Set out discipline potential
 - Consent to interception



mcynesboone
Setting precedent.

Lawrence Morales II

210.225.0811

lawrence@TheMoralesFirm.com

haynesboone

Thank you for your time and attention!

getting president.