



Virginia Workplace Law

What's Not To Like About Social Media?

By: Annemarie Cleary. *This was posted Friday, January 14th, 2011*

Whether it is the creation of instant stardom for a homeless man (the “voice” Ted Williams) through a viral [YouTube video](#), or the tweeting of a [congresswoman’s imminent meeting](#) in a parking lot and subsequent tweeting of the [tragedy](#) that followed, [social media](#) has changed the way we live, work and think.

A business’ concerns with social media is no longer just about preventing lost work time (which remains a significant problem – as much as [20 minutes out of every hour](#) your employees are at work!). The explosive growth of social media, and social networking in particular, carries with it a host of additional risks to employers, making it a Pandora’s Box of ills.

Social Media Policies May Violate Labor Laws. Even if you don’t have a unionized workforce, the [National Labor Relations Act](#) (NLRA) protects all employees’ rights to engage in concerted protected activity for their mutual aid and protection. This means that if employees start a chat group on the internet to complain about how much you pay them, they have engaged in protected activity and you cannot fire them. If you have a policy against such activity, that policy is unlawful because it interferes with their right to communicate with co-workers about the terms and conditions of their employment. The rule on what constitutes a permissible social media policy by an employer is in a state of flux. Prior rulings by the [National Labor Relations Board](#) (NLRB) gave employers a measure of latitude in what employee conduct could be restrained. The new, pro-union NLRB has indicated it may be providing a new perspective on what policies will be deemed lawful. A regional NLRB office [issued a complaint](#) in October against an employer for terminating an employee who criticized her supervisor on her Facebook page. The board’s eventual decision won’t be made for a while. So in the interim, employers are left with limited guidance on what to do about their social media policies. What is clear is that conduct that might be concerted in nature loses the protection of the NLRA when that conduct is “egregious.” What the NLRB keeps changing is what type of conduct is deemed egregious. Therefore, employers may want to seek legal counsel before they fire an employee over social media conduct. Even non-union employers are subject to unfair labor charges for such conduct.

FTC – Deceptive Trade Practices Claims: Under new Federal Trade Commission guidelines on [endorsements and testimonials](#), employers can be held liable if employees post information on the web about the company’s services or products without disclosing the employment relationship. In light of the new guidelines, employers

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should have written policies that establish the type of disclosure an employee must include when blogging about their company's services or products. For example, your policy might include a requirement that any post concerning the company's services or products include the statement, "I am an employee of ABC Corporation. These are my own opinions and not those of the company."

Stored Communications Act: Monitoring an employees' personal communications at work requires a delicate balancing act. Although employees who post information to public social media sites give up some expectation of privacy, an employer easily could run afoul of the [Stored Communications Act](#). Under the Act, it is a crime to intentionally access without authorization, or beyond the scope of the authorization granted, a facility through which an electronic communication service is provided to obtain access to a wire or electronic communication while it is electronically stored on such a system. What this means is that an employer cannot retrieve keystrokes from an employee's computer to access an employee's private site, nor can an employer require an employee to surrender his or her login information to access a private site, even one established by employees about the company.

Combating Negative Blog Posts: Letting employees go carries with it the hazard that a site named [www.ihateXYZcorporaton.com](#) pops up. It can be difficult to combat negative posts to employee gripe sites from a public relations perspective. Calling attention to the site can be an implicit endorsement of its content. Instead, an employer could gather a small group of satisfied employees to monitor and post positive messages in response. You're not looking to directly refute the blogger, but to provide positive comments about the company to balance out the negative. Another useful step is to establish your own blog with a weekly post about the benefits of working for your company, employee satisfaction and other useful information.

LinkedIn: Writing a recommendation for an employee on sites like LinkedIn may seem harmless; but it could come back to haunt you. If the lauded employee is later terminated, no matter how good the reason, a [LinkedIn recommendation](#) from a supervisor could allow the employee to argue that the reasons given for termination were pretext. Think before you post that glowing recommendation that lasts forever. In addition, many employers require employees to use LinkedIn for sales and networking purposes. If the employee is connecting with key company clients and resources, those client lists and resources have arguably now become public. Once that employee leaves, the employer may have difficulty protecting the information as "confidential" or "trade secrets."

Harassment Claims. Employee use of social media sites are just one more method of harassment that could subject an employer to a lawsuit. Once an employer is notified of a claim of harassment via social media, it must investigate as it would any other claim of harassment in the workplace. Of course, the employer must be sure that its policies regarding harassment do not violate the employee's NLRA rights.

Given the explosion of issues surrounding social media sites, be sure your company's policies are up to date. If you need help adjusting those policies to protect your company, contact a [Virginia employment attorney](#).

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