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## Employee expectations and business risks in social media

Bret Meich, 2/27/2012

Social media use in and out of the workplace continues to proliferate. Improper use carries risks to businesses, such as unauthorized disclosure of confidential information, infringement on intellectual property rights and unlawful harassment. These risks also affect employment decisions and brand reputation. It will come as no surprise that a recent survey by Harvard Business Review found that instances of brand reputation loss due to employee misuse of social media affected half of the world's most admired companies. Therefore, organizations should consider a social media policy to minimize the risk of employee misuse of social media.

### The risks

Social media searches on job applicants: Screening job candidates using social media poses several legal and practical risks. If you use a social networking website or search engine to review applicants, you might discover that an applicant is disabled or of a particular religion. If the individual is later rejected, the applicant could claim discrimination because of the protected characteristic you discovered based on that search.

In a recent poll by the Society of Human Resource Managers, 67 percent of organizations reported that they have never and do not plan to use social media for screening job candidates — a percentage that has not changed since 2008. Only 18 percent of organizations report using social media to screen job candidates during the hiring process, though that represents a 5 percent increase since 2008. Legal risks, the inability to verify with confidence information on applicant's social networking page and relevance to performance are the top three reasons why organizations do not use social media to screen job candidates.

If you decide to use social media to investigate applicants, there are some things you can do to help protect your company. First, only check finalists and do not discriminate in who you select for such scrutiny. You would not want to conduct Facebook searches only on minorities or persons who appear to have a particular national ancestry. Second, have someone not involved in making hiring decisions review this information and pass on only what's relevant. If you use a third party, comply with Fair Credit Reporting Act. Third, have a policy on social media searches to insure consistency. Finally, if you are inclined not to hire an applicant based on social media research, allow the person an opportunity to explain the disqualifying information.

National Labor Relations Board restrictions: The NLRB has restricted disciplinary action based on employee use of social media. Although there has only been one trial so far, the Office of the General Counsel has issued a series of advice memoranda finding that overly-broad social media policies may interfere with an employee's rights, and disciplining an employee for engaging in protected activity can result in the NLRB filing an unfair labor practice charge against the employer. One case involved an ambulance company. The NLRB filed a charge against the company because an organization fired an employee for posting on Facebook that her supervisor was a "dick" and a "scumbag." Because co-workers made sympathetic posts, the NLRB concluded that she had engaged in concerted protected activity. What should you do in such a situation? Include appropriate disclaimers in your social media policy to make it clear that your policy is to be construed so as not to infringe upon one's rights and check with legal counsel before terminating or disciplining any employee for violating your social media policy. These risks are not exhaustive, but they exemplify some of the issues businesses face with the use of social media.

### The policy

A social media policy should be tailored to each company. Policies should, however, set forth clear, written terms and ensure the organization's use of social media complies with all applicable laws. It is also recommended that businesses make the policy widely-available, enforce it consistently, discipline violators, and regularly train employees.

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One size does not fit all. The maxim “one size does not fit all” is especially true with social media policies. You should consider your organization’s goals, emphasizing your business and marketing objectives. Are you primarily concerned about limiting liability, controlling your message, or protecting sensitive and confidential information? Your social media policy should also be consistent with sexual harassment policies and confidentiality and non-compete agreements.

Consider, for example, an employee’s dual-use devices, such as smart phones and personal computers that the employee will use for both personal and business purposes. Are those devices likely to contain confidential and competitively sensitive information because the devices connect to the organization’s computer network? What if the device is lost or stolen? Do you want to have the right to wipe the device remotely to protect your data? If your top salesperson takes a job with a competitor, are you going to require him to delink from customers he linked up with while employed, and have you obligated him to do so with an appropriate non-solicit agreement that would authorize you to demand such delinking?


And are you going to allow employees to friend customers? What about co-workers? Subordinates? If you allow supervisors to recommend subordinates or former subordinates on LinkedIn, are you going to be hamstrung in your defense of a discrimination claim if you fire the subordinate for poor performance?

Training. All employee policies are of limited use if you do not properly train supervisors and employees on their expected behavior. Employees should be informed on what they can and can not post and the dangers of allowing confidential information to be disclosed. Because of the continually-changing social media environment, employees need to be regularly advised on privacy settings and the permanence of an internet post.

Given that social media law is rapidly changing, do not hesitate to get advice from legal counsel familiar with social media law.

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