MAYER·BROWN

Employment Law Issues in Social Media

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Why Should Employers Be Vigilant About Social Media?

Significant public relations, liability and legal repercussions can arise in the employment context from the explosive growth of social media:

Remember Good Ol' Email

Legal Issues re email

- More communication
- More informal communication (led to issues)
- Retention issues
- After some growing pains—lawyers got control

Legal Issues re Social Media

- Lifecasting
- Blurring the lines between public and private, business and personal
- Whose information is it?
- Who needs to retain it?
- How do you get it?

Same Ol' Legal Principles

- At the stage where old rules are being applied to a new technology—uncertainty
- New risks—legal and otherwise
  - Consumers have as loud a voice as advertisers
  - Employees have as a loud a voice as employers
- Companies face external issues (e.g., what company and its employees are saying to the world)
- Companies face internal issues (e.g., how are employees using Social Media)

BEFORE, DURING AND AFTER EMPLOYMENT

BEFORE EMPLOYMENT

Screening Candidates

- Employers often differ in how they handle social media in screening candidates, even within the same industry
  - October 2010 informal survey
- Some employers find it useful to search social media sites to screen candidates—and many others plan to do so
- Can find some great information
  - Personality
  - Integrity
  - Communication style

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.

Tim Levad at Cisco saw the Tweet, and tweeted back:

Who is the hiring manager. I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the web.

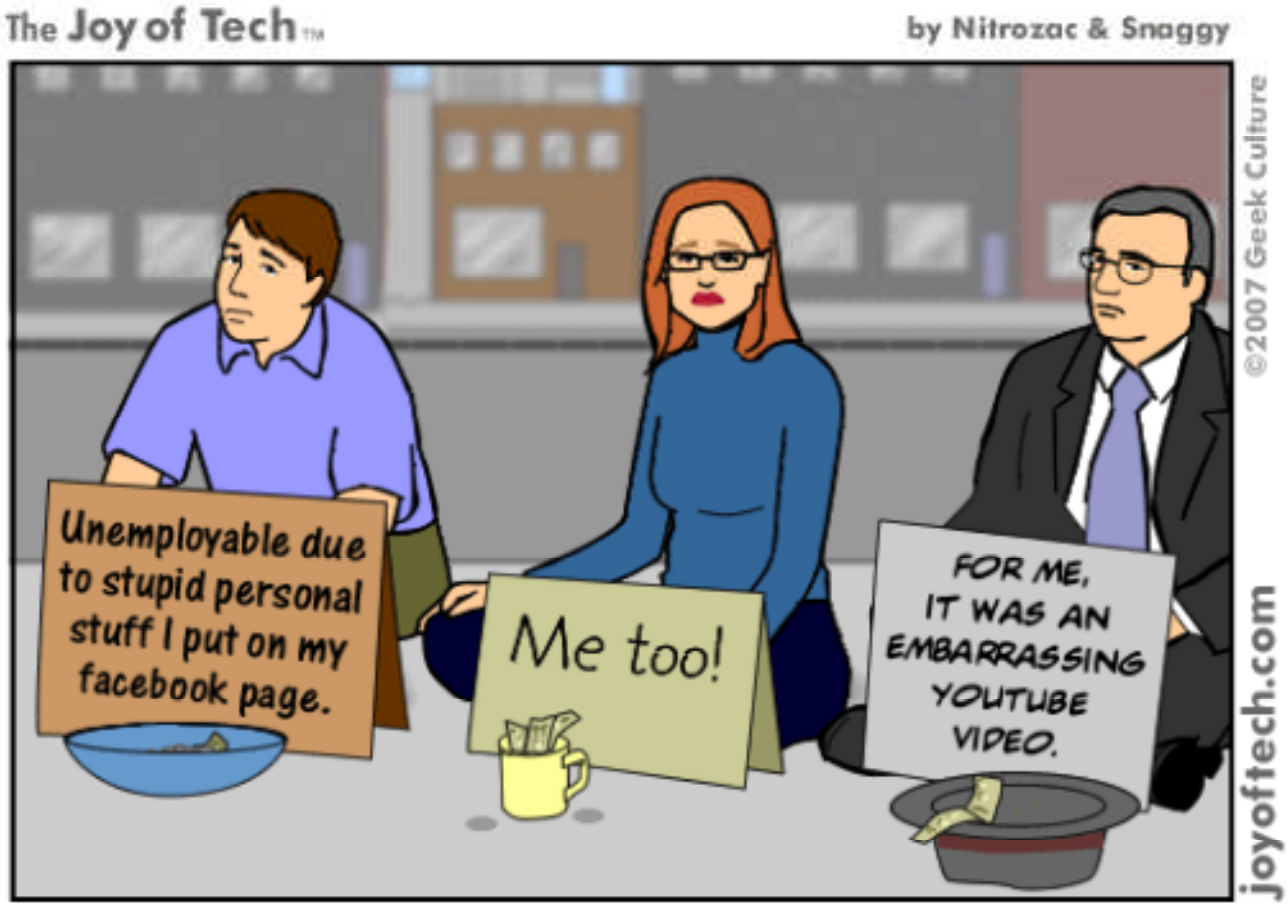
But Be Careful …

- Can also find information that is protected by Title VII and various state laws
  - Age, race, national origin, sexual orientation
  - Religious beliefs
  - Marital status
  - Pregnancy
  - Political affiliations
  - Information about disabilities
- Can't be basis of the decision—and need to be able to prove that

Recommendations

- Non-decision maker screen—pass along form with only appropriate information
- Keep records associated with hiring decisions (Title VII)—including print-outs of SM pages and the resulting forms
- Disclose to applicants that SM pages may be searched
- Treat all applicants consistently (i.e., don't only search SM pages of a certain applicant category)
- Careful what sites are searched:
  - Fair Credit Reporting Act prohibits employers from getting criminal history from "consumer reporting agency" without the subject's notice and consent—and employer relying on an consumer reporting agency's report must give adverse action notice
  - Some search engines have been accused of being a "consumer reporting agency"

DURING EMPLOYMENT



Signs of the social networking times.

Some Considerations for Employers

- Need to be analyzed in light of corporate culture and benefits and risks of social media
  - Ban it during work hours? Encourage it? Remain neutral?
  - Impact on employee morale
- Benefits
  - May help promote brand recognition and marketing
  - Increased contact with customers, sales, and for public relations
- Risks
  - Disclosure of business plans/strategies, financial data, etc.
  - Customer risks and other privacy issues, especially in regulated industries like financial services and health care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Sad to hear of the passing of Sayyed Mohammad Hussein Fadlallah.. One of Hezbollah's giants I respect a lot..
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so not looking forward to another year at Cohasset Schools


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TEACHER RESIGNATION
"Now I remember why I stopped teaching! Kids... they are all germ bags!"


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I'm downtown eating. Surrounded by Mormons and repressed sexual energy.
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Should You Monitor Current Employee Activity?

- Some reasons to do it
  - Make sure use of social media is not interfering with work
  - Make sure employees are following company policies
- May help prevent false advertising claims when employees comment on the company or its business
  - FTC Guideline (16 CFR § 255): liability for failing to disclose material connections with endorsers
- Monitoring use on company time less problematic

But Caution Should Be Taken If Monitoring Occurs

- Many states don't allow adverse employment actions for legal off-duty conduct (e.g., California Labor Code Section 96(k), New York, others)
  - Could lead to invasion of privacy claims and class actions (blurred line)
  - Risk of discrimination, retaliation and whistleblower claims
- Stored Communications Act (SCA) arguably prohibits employers from monitoring employees' online activity without proper authorization
- Some states (e.g., Connecticut Gen. Stat. § 31-48d also require notice to employees in advance of monitoring computer usage and work emails
- Employers may learn things they didn't really want to know about employees' personal lives
- Employees may claim that information was gained through misrepresentations or other unlawful means, e.g., ghost accounts
  - *Pietrylo v. Hillstone Restaurant Group*, 2009 U.S. Dist. Lexis 88702 (D.N.J. 2009) (jury verdict upheld under SCA)

Recommendations, Part 1

- Adopt a social media policy with specific guidance on what is, and what is not, permissible
  - Provides clarity to employees, which is important
  - Minimizes potential impact on the company of ambiguities
    - *Stengart v. Loving Care Agency, Inc.,* 990 A.2d 650 (N.J. 2010) ("As written, the Policy creates ambiguity about whether personal e-mail use is company or private property")
    - *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) ("employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated")
- Ensure that the policy states that the company may monitor all uses of workplace computers, including use of social media
- Expressly incorporate other key policies (e.g., discrimination, harassment, confidentiality, non-disparagement, technology, codes of conduct)

Recommendations, Part 2

- Check the scope of applicable off-duty conduct laws before taking action
  - Unflattering conduct (e.g., video of drunken behavior) might not be grounds for disciplinary action
- Provide regular reminders about the policy and, if needed, specific training
- 21st Century proverb: "What happens in Vegas stays ~~in Vegas~~ on MySpace, Facebook, Twitter, etc."
- Make clear who can and cannot speak on the company's behalf
  - Stress importance of refraining from creating appearance that employees may be speak on behalf of company; consider disclaimer language
  - Prohibit anonymity; employees must disclose who they work for when commenting on company or its business
- Don't be afraid to revisit social media policies; business needs may change

Recommendations, Part 3

- Inform employees about approved procedures and company policies regarding endorsements of company products
- Explain the risks of false advertising associated with company products, as well as potential defamation of competitors
- Preclude use of company logos, likenesses, images and trademarks without the company's written consent
- Prohibit employees from including references to company clients, customers, and partners without their written consent
- Require employees to sign acknowledgments of receipt of the policy
- If necessary and appropriate (e.g. securities industry), ensure policy informs employees if off-duty use will be monitored (should decrease reasonable expectation of privacy)
- FINRA Regulatory Notice 10-06 (addresses use of SM for business purposes)

AFTER EMPLOYMENT

What About References (e.g., LinkedIn)?

- Former (or current) employees may ask for a reference
  - "Grade inflation" and/or sweeping endorsements about skills
  - Risk that statements will be inconsistent with termination, litigation, or discipline positions that employer takes
- Trend in best practices: policy against allowing employees to endorse or recommend on LinkedIn or other sites
  - Beware of set up for defamation or pretext claim
  - At minimum, require supervisors to consult with HR first
- Non-solicitation?
  - *TEKsystems, Inc. v. Hammernik*
  - No reference to social media in the restrictive covenants

Is Social Media Discoverable in Litigation?

- Cannot get information from SM sites. *See Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010); Stored Communications Act.
- Can request from plaintiffs; courts have gone both ways
  - Some courts have denied "fishing expeditions" into plaintiffs' SM accounts where potential relevance not shown. *McCann v. Harleysvill Insurance*, NY Supreme Court Appellate Division, Case No. 10-00612.
  - Pennsylvania court granted defendants access to Facebook and MySpace posts by a man suing a Pennsylvania raceway for injuries; no reasonable expectation of privacy in social media, even though plaintiff had activated privacy settings. Plaintiff ordered to produce his user names and passwords, and not to alter or delete information posted at the sites. *McMillen v. Hummingbird Speedway Inc.*, 2010 Pa. Dist. & Cnty. Dec. Lexis 270 (Pa. 2010).
  - Similar ruling by a New York trial court in *Romano v. Steelcase*, 2010 NY Slip. Op. 20388: defendant sought Facebook and MySpace pages claiming they might reveal information inconsistent with plaintiff's claim for loss of enjoyment of life; court allowed discovery
- Employers will have many arguments for the discovery; e.g., emotional distress, consistent with factual allegations, location. *See EEOC v. Simply Storage Management*, 270 F.R.D. 430 (S.D. Ind. 2010) (allowing SM discovery in harassment case where emotional distress at issue)

NLRB's Position

- NLRB's General Counsel issued a complaint on Oct. 27, 2010 against a Connecticut ambulance service (American Medical Response of Connecticut) that fired an emergency medical technician for allegedly violating a policy that bars employees from depicting the company "in any way" on SM in which they post pictures of themselves; she also had criticized her supervisor on Facebook and got supportive comments
- Complaint alleges that the company's policy "interferes with, restrains, and coerces" employees in the exercise of their rights under the NLRA
- *NYT* quoted GC: "This is a fairly straightforward case under the National Labor Relations Act — whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that."
- NLRA gives workers a right to form unions and prohibits employers from punishing workers — whether union or nonunion — for discussing working conditions or unionization
- Recommendation: not all criticism is concerted activity or will be work-related (can still be disciplined for personal attacks on supervisors), but employers must be wary of NLRB's position in reviewing their policy and practice

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