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Understanding Key Social Media Issues in Employment

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In today's global business environment, social media plays an integral role in how businesses operate as companies seek to leverage the unparalleled reach and influence of online communities to increase brand awareness, to better understand market perception, and to market products or services. Not only do companies use social media to promote their businesses, but they use it to facilitate internal communications and to make employment decisions. While significant advantages accrue to companies that harness the power of social media, risks ensue as well.

This practice note addresses how to counsel employers to manage the risks that accompany employee social media use. Specifically, it addresses the following issues:

- Employee Social Media Use May Affect the Employer and Its Brand
- Monitoring Employee Social Media Use
- Social Media and Virtual Harassment
- Intra-Company Social Media Use
- Ownership of Social Media Accounts

For additional practice notes addressing other social media matters, see *Developing Social Media Policies; Obtaining Information Regarding Job Applicants and Employees from Social Media Websites; Social Media and Settlement and Separation Agreements: Reining in the Impulse to “Share”; Addressing Social Media in Restrictive Covenants; and Understanding the NLRB's Positions on Regulating Employees' Social Media Usage*. See also *Social Media Policy*.

Employee Social Media Use May Affect the Employer and Its Brand

In recent years, countless examples of employees portraying their companies in a negative light have gained notoriety through social media. For example, in 2008, several Burger King employees posted a video on MySpace of an employee taking a bubble bath in a restaurant sink. Less than a year later, two Domino's Pizza employees posted a video on YouTube of an employee putting cheese up his nose and mucus on sandwiches. Company executives also fall prey to such behavior. In 2012, the chief financial officer of Francesca's, an apparel and accessories retailer, was terminated after he improperly communicated confidential financial information days before the company filed its annual SEC report. In 2013, a public relations executive with InterActiveCorp was fired over an insensitive tweet about AIDS and race in connection with her upcoming trip to Africa.

Although some say that all publicity is good publicity, most companies would rather avoid the spotlight of a social media scandal. Negative publicity can hurt a company's brand and its bottom line. You should therefore advise your clients to carefully consider the benefits and risks associated with social media and encourage them to implement a comprehensive social media policy and to weave social media into other policies as appropriate. Among other things, the employer's policies should clearly inform employees about the company's expectations with regard to their social media use—even when they use social media during their time away from work. The employer should also set forth the company's expectations about the type of information that their employees may post on social media, including limiting employees from sharing certain confidential or proprietary information or claiming to speak on behalf of the company. In fact, to comply with the Federal Trade Commission's guidelines on endorsements, the employer should require that when employees post about the company's products or services, they identify their relationship to the employer and expressly state that their views are not necessarily those of the company or its affiliates. The employer should also specify that the company owns all social media accounts used by the employee in the course of his or her work for the company. The following sections contain additional tips on best practices for employer social media policies.

For a comprehensive list of issues that employers should consider when updating their employee handbooks to address social media, see Checklist – Addressing Social Media in an Employee Handbook. For a full annotated social media policy, see Social Media Policy. See also Developing Social Media Policies.

Monitoring Employee Social Media Use

You should advise employers that the unauthorized monitoring or accessing of employee personal social media accounts may implicate the federal Stored Communications Act (SCA), which generally prohibits intentional, unauthorized access to electronic information. Although the SCA was enacted well before the advent of social media, courts have started applying the SCA to social media. For more information on the SCA, see Navigating the Stored Communications Act.

Example of the SCA's Application to Social Media Use

In *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659 (D.N.J. 2013), a paramedic alleged that her hospital employer violated the SCA by temporarily suspending her after she posted on her personal Facebook account that the paramedics responding to a shooting should have refused to treat the suspect and that the security guards needed target practice. Although the paramedic took advantage of Facebook's privacy settings to limit the audience of her wall posts to her Facebook friends, one of her coworkers (who was a Facebook friend) sent screenshots of the posts to hospital management.

Ultimately, the court dismissed the SCA claim at summary judgment. However, the court first held that the SCA applied to the paramedic's Facebook posts because "[t]he legislative history of the SCA suggest[ed] that Congress wanted to protect electronic communications that are configured to be private." *Id.* at 666. (Citation omitted.) The court emphasized that because the posts were electronic communications that were not accessible to the general public (due to Facebook's privacy settings) and because Facebook is an electronic communication service that archives posts and messages, the SCA applied to the posts. Nonetheless, the court concluded that the hospital employer did not violate the SCA because it was undisputed that the coworker voluntarily sent the screenshots to hospital management. Therefore, the hospital was an authorized recipient of the posts, and the SCA's "authorized user" exception applied. This exception applies when access to an electronic communication is "authorized . . . by a user of that service with respect to a communication . . . intended for that user." See 18 U.S.C. § 2701(c)(2).

Employers Should Not Intentionally Access Employees' Personal Social Media Accounts Without Prior Consent

As the *Ehling* decision suggests, the SCA may limit employers' ability to monitor employees' social media use. Although viewing public social media content likely will not run afoul of the SCA, you should advise

employers not to intentionally access their employees' personal social media accounts without authorization. Although the Ehling court concluded that the hospital's conduct fell within the SCA's "authorized user" exception, the result would likely have differed had the hospital solicited the posts or demanded access to the paramedic's Facebook account.

Social Media and Virtual Harassment

Although many companies have policies that prohibit employees from engaging in discriminatory behavior or harassment, you should explain to employers that social media can complicate their attempts to foster a harassment-free workplace. The ease of broadly disseminating information through the press of a button or the click of a mouse enables employees to use social media to create a hostile work environment in countless ways. For example, a workplace complaint can arise from one employee's decision to share a video on YouTube, spread a rumor on Facebook, or circulate photos on Instagram. Thus, you should counsel employers that employee activity on social media, like actions in the workplace, can result in harassment, discrimination, or hostile work environment claims. Employers should review their discrimination, harassment, and social media policies to ensure that they address any potential unlawful employee behavior that occurs online or through social media.

As discussed in *Understanding the NLRB's Positions on Regulating Employees' Social Media Usage*, much controversy surrounds the ability of companies to protect themselves with social media policies in light of recent National Labor Relations Board (NLRB) decisions and commentary. As a result, companies are faced with the difficult task of implementing sufficiently narrow policies that do not run afoul of the National Labor Relations Act's requirement that employees be permitted to engage in protected, concerted activity, while also maintaining enough flexibility to address legitimate workplace concerns and inappropriate employee behavior.

Tips for Drafting Policies to Help Prevent Discrimination and Harassment on Social Media

Despite the uncertainty with the NLRB's stance on regulating employee social media activity, you should still advise your clients to draft their social media policies to limit their potential exposure to employment-related lawsuits arising from employee misuse of social media. This section contains tips for drafting such a policy. For a full annotated social media policy, see *Social Media Policy*. See also *Developing Social Media Policies*; and *Checklist – Addressing Social Media in an Employee Handbook*. The policy should

- include restrictions on electronic communications or incorporate the terms of the company's electronic communications usage and monitoring policy;
- prohibit the use of company computer systems and other company-sponsored technology to create, download, solicit, or distribute offensive materials, including through the use of social media sites;
- provide that employees may not use social media to discriminate against or harass their coworkers;
- warn employees that they may be subject to discipline if they engage in any form of harassment, intimidation, or unlawful conduct towards their coworkers;
- address company guidelines on "friending" and other social media relationships between supervisors and subordinates;
- provide that the company has the right to access any electronic content, including social media, on any company-sponsored technology so that it can take immediate action upon learning about any alleged incident of discrimination or harassment;
- warn employees that the company may monitor any electronic communications, including social media use, on any company-sponsored technology; and
- be sufficiently clear so that employees understand the type of conduct that is prohibited and include specific examples of prohibited conduct to avoid being overbroad.

Steps to Help Avoid Social Media Discrimination and Harassment Claims

You should also remind employers to apply their anti-harassment and discrimination policies in a uniform manner. Although employers may tend to treat face-to-face misconduct more seriously than online conduct, employers are not shielded from liability merely because an employee chooses to harass a coworker on Facebook. Therefore, you should advise employers to take any necessary steps to adequately investigate allegations of online or social media-based discrimination and harassment. In addition, they should encourage their employees to report any discriminatory or harassing behavior, regardless of the forum, and clearly communicate to employees the proper procedures for doing so.

No employer can fully control the actions of its employees on social media. However, by encouraging employers to take proactive measures, including implementing a clear social media policy, investigating any allegations of employee misconduct, and disciplining employees whose actions are discriminatory, harassing, or may otherwise lead to a hostile work environment, employers can reduce their legal risks associated with social media.

Intra-Company Social Media Use

With an increasingly mobile workforce, and a growing number of employees who can work remotely, many companies have started using internal social media networks like Yammer or Tibbr to facilitate communications among their employees. Below are key pieces of advice you should provide to employers concerning the use of internal social media networks.

- *Determine what types of information employees may post.* Although employees are more likely to act appropriately when using a corporate-sponsored internal social media network, you should nonetheless advise employers to tailor their social media policies to address what employees can and cannot post on such networks. Employers should also keep in mind that any internal employee posts may ultimately get disseminated to the public. Just as it is impossible to completely control employees' external social media posts, it is also impossible to prevent, with absolute certainty, employees from disseminating information shared internally.
- *Limit which employees may post certain information.* Although internal social media networks exist to facilitate communications among employees, you should advise employers to consider whether to limit which employees can post about certain topics or issues. Employers may want to limit, for example, who can post about particular management initiatives or human resources issues. Similarly, employers should consider whether to permit open communication across the entire company or to limit the prospective audiences by division, department, or practice area.
- *Monitor internal social media posts.* It is also a good practice for employers to select certain employees to monitor the internal social media posts relating to specific topics and take down any posts that do not comply with company policy. For example, having an IT supervisor monitor technology-related posts is useful because that individual will more likely have familiarity with the subject matter and the employees who are posting.
- *Consider that internal social media posts are discoverable.* You should advise employers that internal social media posts, like other forms of electronic communication, may be discoverable in future litigation. For example, if internal social media posts could be construed as having any relation to an employment discrimination or harassment claim, the posts will likely be discoverable. You should therefore advise employers to keep this in mind when drafting their social media policies and encourage them to educate their employees about the risks associated with posting inappropriate material on internal social media networks.

Ownership of Social Media Accounts

Not only are companies hiring employees whose sole job is to promote the business on social media, many others encourage their employees to maintain social media accounts for work-related purposes. Because the law relating to employee social media use is still developing, few published decisions address what happens when an employee who promotes a company's business on social media leaves the company. Consequently, companies should proactively address the ownership of social media accounts used for business-related

purposes. Otherwise, without a clear policy or agreement, they risk losing access to those accounts—along with any related contacts—if an employee leaves.

Example of Former Employee Suing for Control of Social Media Account

In *Eagle v. Morgan*, 2013 U.S. Dist. LEXIS 34220 (E.D. Pa. Mar. 12, 2013), a former president of a banking education company sued her former employer, claiming that the company wrongfully commandeered her personal LinkedIn account after she was terminated. During her employment, the plaintiff had been a key sales generator for the company, which relied heavily on its senior executives' LinkedIn accounts to generate business. Although the plaintiff used her personal LinkedIn account to promote the company's business, she provided her password to other company employees and directed them to maintain her account, update the content, respond to messages, and expand her connections. After the plaintiff's termination, the company continued to use her LinkedIn account to promote its business. The plaintiff alleged that the company's actions invaded her privacy and misappropriated her identity because the company held on to her account, blocked her from accessing it, and replaced her personal information with the information of a newly appointed interim chief executive officer.

The court concluded that the company's conduct, which was not authorized by any established social media policy, was an unlawful use of the plaintiff's name and an invasion of privacy. Nonetheless, the court concluded that the plaintiff was not entitled to any damages because she could not identify any specific business deals that she lost because of the company's actions or her lack of access to her LinkedIn contacts.

Although the plaintiff could not recover any damages, the *Eagle* decision is important. Notably, it suggests that, absent a company policy or agreement establishing otherwise, individuals will maintain ownership of their social media accounts even if they grant access to other employees and direct those employees to maintain and develop content on the accounts for their employers. Had the plaintiff's company proactively implemented such a policy, it may have avoided the lawsuit.

Tips for Policy Provisions to Help Prevent Ownership Disputes of Social Media Accounts

Given the potential legal and business implications relating to the ownership of social media accounts, you should advise employers to address the ownership of social media accounts in their social media policies and any related employment agreements. Preliminarily, you should generally counsel employers to not permit employees to post under their own names on company social media accounts or create company social media accounts in their own names. If the employer, however, permits such activity, you should advise it to explicitly address the issue in its policies to avoid a future dispute.

Employers' social media policies should encompass the following provisions and requirements about ownership of social media accounts:

- The company's corporate social media account and all of its postings, contacts, and other information are company property.
- All information relating to any corporate social media account, including the log-in information and any confidential or proprietary information, must be returned at the end of employment and may not be changed without express authorization.
- Personal social media accounts that are created and/or maintained for company-related purposes are company property, including any company-related postings, contacts, or other information.
- At the end of employment, employees must return all information relating to personal social media accounts that are created and/or maintained for company-related purposes, including the log-in information and any confidential or proprietary information.
- Define confidential and/or proprietary information to include social media accounts on sites like Facebook, Twitter, and LinkedIn.
- Employees must acknowledge their consent to the terms of the social media policy before they are permitted to create or access business-related social media accounts.

- Outline any disciplinary procedures that will result from an employee's failure to abide by the terms of the policy.

Employers should also ensure that non-disclosure and non-compete agreements include any relevant information that may be posted or maintained on corporate or personal social media accounts used for business-related reasons. See *Addressing Social Media in Restrictive Covenants*.

For a full annotated social media policy, see *Social Media Policy*. See also *Developing Social Media Policies*.

Employers Should Monitor Developments

As social media law and social media practices are still in their infancy, you should advise employers to stay attuned to new developments to ensure that they take advantage of the benefits of social media while limiting their exposure to the potential risks. Employers should update their policies and practices regarding social media as jurisprudence, technology, and networking practices evolve.

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