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Social Media in the Workplace: What's Trending for 2014?

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Social Media & Privacy

- Creative new uses of digital data and social media content
  - Behavioral marketing and use of geolocation information
  - NSA and others – “connecting the dots” (Snapchat and retailer hackers)
- Microsoft Research – studies into use of social media activity to assess mental health
- Social media has blurred the lines between personal and professional life
- And you can, and will, be found
  - Recent scholarship into “de-anonymization”

Social Media & Privacy

- I blame Smart Phones
  - BYOD – by design, mixes business and personal content
  - Lots of potential evidence here for litigation (discrimination, harassment, etc.)
  - "What's yours is mine": *Garcia v. City of Laredo, Texas* (Dec 12, 2012 5th Circuit)
  - Usually no expectation of privacy when communicating using employer technology (often depending on usage policy and actual practices)
  - Need appropriate employee warnings to avoid surprises and adverse employee reaction
  - Employees should understand that this information, which they may consider to be "private," may not be

Social Media & Privacy

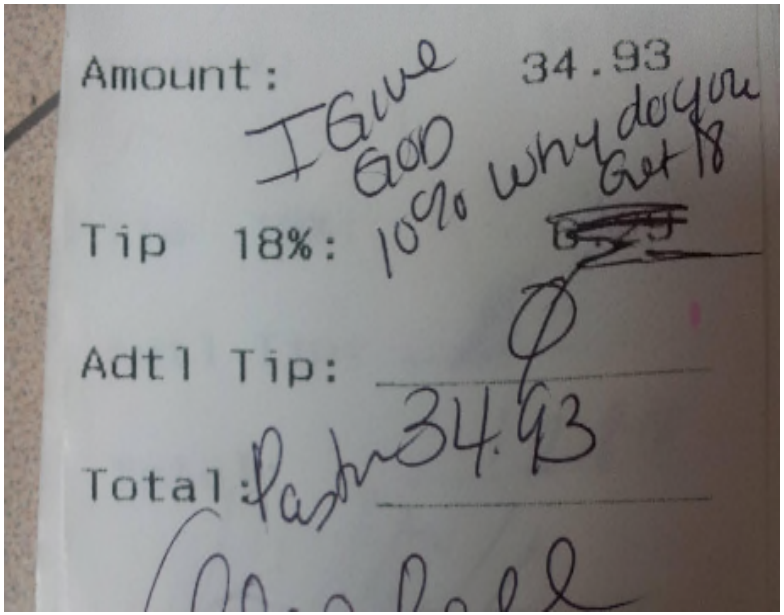
- Social media at work
  - Essentially impossible to stop
  - Employers should have workable, well-balanced policies, considering the culture of the particular organization
- Social Media outside of work environment
  - Power to reach a large audience
  - Numerous examples of content going viral
- How does an organization protect itself?
  - NLRB restrictions on policies
  - Recent "Facebook Firing" cases, e.g., *NLRB v. Richmond District*

Social Media & Privacy

- Blogging, Tweeting, etc.
  - Emboldened by believed anonymity and reach of social media
  - "Cyberstalking"
  - Disclosure of sensitive and/or embarrassing information (e.g., Jofi Joseph)
- Can raise legal claims and, for lawyers, ethical issues

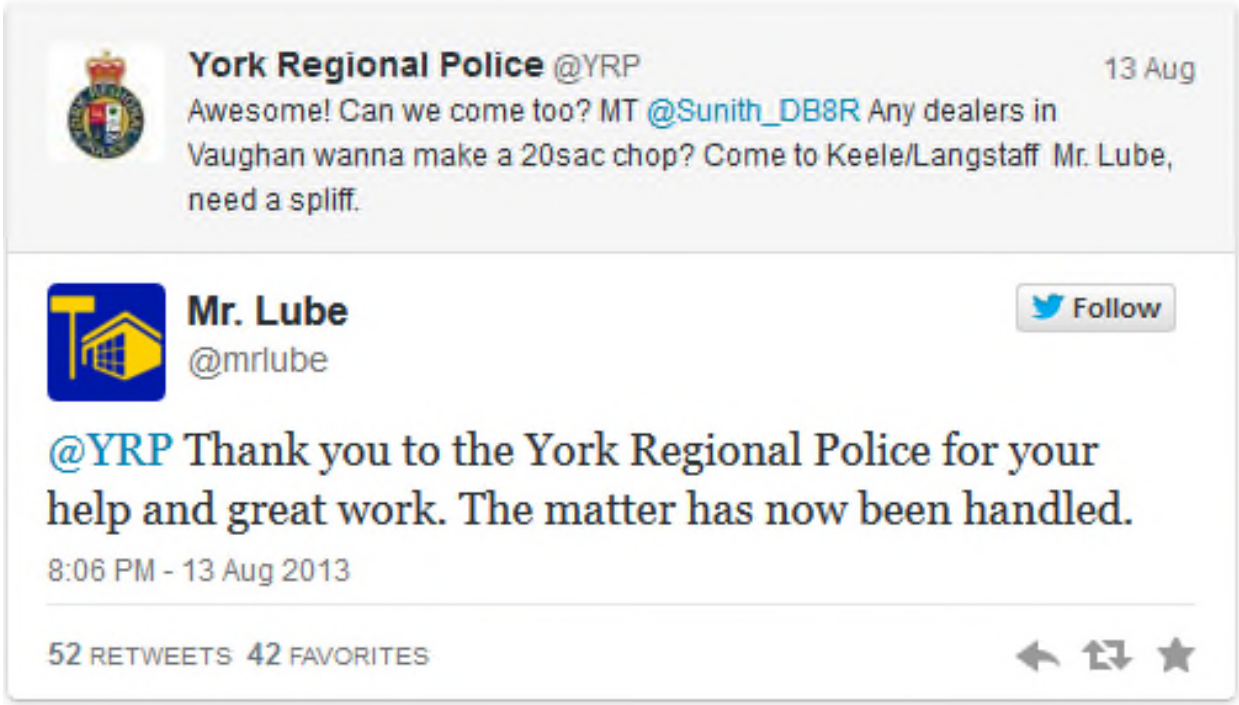
Social Media & The Employment Relationship

- Employees' increasing use of social media – both personal and professional accounts – raises a number of issues.
  - Risks (and legal issues) increase because of the speed, broad reach, and permanence of communications on social media.



Social Media & The Employment Relationship

- What not to tweet on the job:



Social Media & The Employment Relationship

- More information about employees is available through social media.
- We are starting to see more cases come through the courts and administrative agencies that provide guidance on how to deal with employees' use of social media.

Social Media Evidence in Employment Cases

- Information on social media—including the timing and location of posts, tweets, check-ins—provides a window into employees' schedules
- Wage/hour litigation: Social media evidence can be useful in assessing whether employee was on a break or using meal/rest periods
- Courts permit discovery sometimes but won't allow "fishing expeditions"
  - *E.g.*, *Jewell v. Aaron's, Inc.* (N.D. Ga. July 19, 2013) (citations omitted):
    - Notes that social media "content is neither privileged nor protected by any right of privacy" that would preclude discovery, yet "the Federal Rules do not grant a requesting party a 'generalized right to rummage at will through information that [the user] has limited from public view."
    - Required "a sufficient predicate showing" that plaintiffs were "forced to work through their meal periods"

Social Media Evidence in Employment Cases

- Evidence can be relevant in discrimination cases
  - *E.g.*, *Giacchetto v. Patchogue-Medford Union Free School Dist*. (E.D.N.Y June 13, 2013):
    - Disability-discrimination claims under ADA and state law
    - "The fact that Defendant is seeking social network information as opposed to traditional discovery materials does not change the Court's analysis"
    - Emotional distress: "any specific references to the emotional distress [plaintiff] claims she suffered or treatment she received" as well as "any postings on social networking websites that refer to an alternative potential stressor"
    - Facts underlying lawsuit: "Plaintiff is directed to produce … any social networking postings that refer or relate to any of the events alleged" in the complaint

Social Media Evidence in Employment Cases

- Can employees be on the hook for spoliation of evidence if they fail to preserve social media accounts?
  - *Gatto v. United Air Lines, Inc.* (D. N.J. Mar. 25, 2013):
    - Plaintiff, an employee of another airline injured on the tarmac at JFK Airport, filed a personal injury claim.
    - United sought discovery about injuries from plaintiffs' Facebook account, but plaintiff deactivated the account.
    - Magistrate concluded that adverse inference instruction should be given to jury.

Pre-Employment Screening

- Thirteen (13) states already have laws prohibiting employers from requiring applicants & employees to disclose social media passwords:
  - Arkansas
  - California
  - Colorado
  - Illinois
  - Maryland
  - Michigan
  - New Jersey
  - New Mexico
  - Nevada
  - Oregon
  - Utah
  - Vermont
  - Washington
- As of January 7, 2014, legislation is pending in sixteen (16) states.

Be Careful When Using Social Media to Screen…

- Social media sites may provide information that a company cannot consider in hiring decisions.
- Learning such information from social media can put a company at risk of claims.

For example:

- Claims based on protected characteristics (federal or state law):
  - Age, race, national origin, sexual orientation
  - Religious beliefs
  - Marital status
  - Pregnancy
  - Political affiliations
  - Information about disabilities

Be Careful When Using Social Media to Screen…

Other Potentially Interesting but Risky Information May Appear on Social Media Sites:

- Prior Claims: Lawsuits against other employers or whistle-blower activities generally may not be considered (to avoid assertions of retaliation).
- Credit History: Eight states currently limit employers' use of credit information in making employment decisions.
- Criminal History: Arrest or conviction information may appear. Can be relevant to hiring decision or to regulatory requirements, but beware of EEOC guidance and state-law limitations on using such information.
- Union Activities and Complaints about Employment Conditions: Recruiters who reject applicants because they trash former employers could face claims if protected activity under Section 7 of the NLRA.

Social Media Policies for Employees

- Policies should provide employees with guidance about the appropriate use of business-related social media accounts, including instructions on how to avoid blurring the lines between company and personal accounts.
- Set forth terms of employee access to company social media accounts and passwords, including procedures to prevent individual employees from changing account usernames or passwords without authorization.
- Be careful not to run afoul of the National Labor Relations Act, state laws restricting employers' access to employees' personal social media accounts, or the applicable social media platforms' terms of use.
- Consider addressing supervisor/management-employee relationships on social media sites.
  - *Stewart v. CUS Nashville, LLC*, (No. 3:11-cv-0342, M.D. Tenn.).
- Make sure policies are crafted to encompass new technologies, e.g. Vine.

Social Media Policies for Employees - Developments

- Background on the NLRB's treatment of social media policies:
  - In the NLRB's view, a social media policy will violate the NLRA if it "would reasonably tend to chill employees in the exercise of their Section 7 rights."
  - A social media policy that does not contain an explicit restriction will still, according to the Board, violate the NLRA if:
    - Employees would reasonably construe the policy to prohibit Section 7 activity;
    - The policy was created in response to protected activity; or
    - The policy was applied to restrict an employee's Section 7 rights.

Social Media Policies for Employees - Developments

- NLRB addresses previously open question about "savings clauses" in social media policies:
  - *Giant Food LLC*, NLRB Division of Advice, No. 5-CA-64795, released July 2013: advice memorandum by NLRB Associate General Counsel Barry J. Kearney concluded that the generic savings clause in an otherwise unlawful policy was insufficient to save the unlawful provisions because it would not be reasonably interpreted by employees that protected activities were actually protected.
  - Also concluded that Giant Food LLC could include in its social media guidelines a prohibition on employees disparaging its products and services, but could not ban the posting of confidential information or the company's logo or prohibit a video being made on the premises.

Employee Discipline for Social Media Activity

Two laws played a prominent role in 2013 for employees bringing claims against employers for firings based on Facebook activity:

- National Labor Relations Act
- Stored Communications Act

Employee Discipline for Social Media Activity

National Labor Relations Act

- *Butler Medical Transport LLC* (Nos. 5-CA-97810, 5-CA-94981, 5-CA-97854; Sept. 4, 2013)
  - A social media post does not lose its protection simply because it might have an adverse affect on the company or its business.
  - A post, however, is not protected if it is "maliciously untrue and made with the knowledge that [it was] false."

Employee Discipline for Social Media Activity

National Labor Relations Act

- *Richmond District Neighborhood Center* (No. 20-CA-091748, Oct. 17, 2013)
  - One of the first to show how employees may exceed the protection of the Act on Facebook.
  - A post can be part of concerted activity but could be "so egregious as to take it outside the protection of the Act, or … to render the employee unfit for further service."
- *Bland vs. Roberts* (No. 12-1671, 4th Circuit Court of Appeals, Sept. 18, 2013)
  - Clicking Facebook's "Like" button is speech protected by the First Amendment.
  - Could foreshadow the NLRB's stance on whether "Liking" something on Facebook is protected, concerted activity under the NLRA.

Employee Discipline for Social Media Activity

Stored Communications Act

- 18 U.S.C. § 2701 provides punishment for whoever:
  - Intentionally accesses without authorization a facility through which an electronic communication service is provided.
- SCA arguably prohibits employers from monitoring employees' online activity without proper authorization or consent.
- Employees may claim that information was gained through misrepresentations or other unlawful means, e.g., ghost accounts or coercion of other employees who are Facebook friends with the employee at issue.

Employee Discipline for Social Media Activity

Stored Communications Act

- *Ehling v. Monmouth-Ocean Hospital Serv. Corp.*, No. 2:11-cv-03305, D.N.J. (Aug. 20, 2013) (granting summary judgment to employer on plaintiff's SCA claim)
  - Court concluded that SCA does apply to Facebook wall posts when a user has limited his or her privacy settings.
  - Here, "authorized user exception" applied because co-worker who showed post at issue to management was not coerced into doing so and was intended viewer of the post since he was Facebook friends with the plaintiff.
  - Underscores that employers will lose protection of the "authorized user exception" if they coerce access to Facebook accounts or use other underhanded tactics. NLRB likely to take same approach.

Employee Discipline for Social Media Activity

Stored Communications Act

- *Rodriguez v. Widener University*, No. 13-cv-01336, E.D. Penn. (June 17, 2013) (SCA complaint survives motion to dismiss because no allegations that the post at issue was publicly available).
  - Employee suspended because he was perceived to be a threat to the community based on his Facebook posts displaying images of weapons.
  - Employer claimed it received post from a Facebook friend of the employee, but that did not appear on the face of the complaint and therefore dismissal was improper.
  - Difficult line to walk between employer's duty to investigate and employee's ability to avoid dismissal by not alleging in complaint whether posts were publicly available.

Post-Employment Considerations

Ownership disputes over company social media accounts

- Who set up the accounts and directed the content when the accounts were set up (during or before employment)?
- Who had access to the accounts and passwords?
- How was the account associated with the employer's name or brand?
- The value of the followers, fans or connections?

Post-Employment Considerations

LinkedIn

- References – what if a former employee requests a LinkedIn endorsement?
  - "Grade inflation" and/or sweeping endorsements about skills.
  - Risk that statements will be inconsistent with termination, litigation or disciplinary positions that employer takes in regards to the employee.
- Consider implementing a policy against allowing employees to endorse or recommend on LinkedIn or other sites
  - Beware of potential for defamation or pretext claim.
  - At minimum, require supervisors to consult with HR before permitting employees to make any such recommendations.

Post-Employment Considerations

LinkedIn

- What if former employee refuses to update profile to reflect that he or she is no longer employed?
  - *Jefferson Audio Video Sys. Inc. v. Light*, Case No. 3:12-cv-00019, W.D. Ky. (May 8, 2013) (dismissed employer's lawsuit seeking to force former employee to update LinkedIn profile.)
- Pursue through LinkedIn terms of use?
- Include requirement in offer letter/separation agreement requirement that employee update all social media accounts to reflect separation within a certain amount of time after termination of employment.

Post-Employment Considerations

Post-Employment Solicitation Through Social Media

- Employers generally have not been successful in challenging a former employee's generic contact of co-workers or customers through social media (e.g., friend "requests" or LinkedIn network request)
- *Pre-Paid Legal Services, Inc. v. Cahill,* Case No. 12-cv-346, E.D. Okla. (Feb. 12, 2013) (court denies injunction to employer who claimed that former employee's Twitter invitations to former co-workers and Facebook posts about his new employer violated non-solicitation agreement)
- Existing contracts and policies may not adequately protect a business from action that can be taken through social networking websites – like public posts on those sites

Trends to Watch for in 2014

1. When does social media activity, which is otherwise protected under the NLRA, become so egregious that it loses its protection?
2. Further interpretation of the Stored Communications Act as it applies to employees' social media activity.
3. Continued developments at the intersection of IP rights and employment rights: ownership and control of social media accounts and contacts.

IP Law for Social Media Is 10 Years Behind Internet IP Law

Internet and IP (20 years of experience, cases and statutes)

- 1991 – first website
- 1994 – Yahoo launches
- 1996 – Panavision sues cybersquatter Dennis Toeppen
- 1998 – early metatag lawsuits
- 1998 – DMCA passes
- 1999 – Anti-Cybersquatting Act (ACPA) passes
- 2010 – YouTube DMCA district court decision issues

Social Media and IP (< 10 years)

- 2003 – MySpace launches
- 2004 – Facebook launches
- 2006 – Twitter launches
- 2009 – first defamation lawsuit over a Tweet
- 2009 – Tony La Russa sues over fake Twitter account
- 2010 – Instagram and Pinterest launch

Internet and Social Media IP Issues

Internet and IP

- Cybersquatting
- Framing
- Linking
- Metatags
- Sponsored search hits (e.g. AdWords)
- User generated content

Social Media and IP

- Fake/parody accounts
- Account ownership
- User/employee generated content
- Endorsements / sponsored content
- Hashjacking

Forms of IP Primarily at Issue in Social Media

Trademarks

- Company names and logos
- Product names and logos
- Taglines

Other Lanham Act claims

- False advertising
- Product disparagement

Other advertising issues

- Undisclosed sponsorships
- Violation of endorsement guidelines

Copyrightable works

- Images
- Text
  - Tweets?
- Music

Publicity rights

- Use of name, photo or likeness
  - Not just celebrities
- Endorsements (actual or implied)

IP Issues Covered Today

- Risks Related to Employee Social Media Postings
  - Implicates Lanham Act, endorsement issues
  - Will discuss 2014 case related to discovery of anonymous Yelp postings
- Ownership and Use of Employee Social Media Accounts in the Company's Business
  - Squarely implicates Lanham Act, rights of publicity
  - Can implicate copyright issues
  - Will discuss one case ongoing since 2011 and two 2013 decisions

Employee Postings on Competitors

- Most companies make a careful review of advertising for compliance with advertising standards, legal and internal
  - Enhanced review for product claims, comparative advertising
- Does your company encourage/condone/monitor what employees are saying about competitors in social media?
  - If not anonymous, is it an undisclosed connection to the advertiser?
  - Are employees making the posts anonymously?
    - (Not just a line employee issue – Whole Foods CEO was caught posting online about a competitor under an anonymous handle)
    - Will those posts stay anonymous?

Yelp v. Hadeed Carpet Cleaning

- Hadeed Carpet Cleaning filed suit against John Doe defendants over allegedly fake Yelp postings – Hadeed could not match dates of service and experience with real customers
- Subpoenaed Yelp for identifying information
  - Yelp resisted on First Amendment grounds and unmasking case law from outside Virginia
  - Hadeed followed Virginia unmasking statute and presented declarations to support subpoena

Yelp v. Hadeed Carpet Cleaning (cont.)

- On appeal of order of civil contempt after Yelp refused to comply, Virginia Court of Appeals held (on January 7, 2014, Case No. 0116-13-4):
  - Virginia unmasking statute constitutional, as commercial speech entitled to less protection and if allegations were true, speech was defamatory
  - Court noted that Yelp TOS specifically requires reviews to be based on actual patronage of business
- Lesson: Anonymous posts may not remain so, and although unmasking statutes/case law differ by state, courts will be sympathetic to aggrieved business owners

Social Media Account Ownership and Use

- Many companies have official social media accounts
  - What procedures are in place to control access to those accounts?
- Employees may run their own related social media accounts with an independent following
  - What happens when those accounts are integrated in to the employer's social media strategy?
    - Employee's functions carried out through personal accounts
    - Other employer personnel granted access to personal accounts

Maremont v. Susan Fredman Design Group

- Jill Maremont was an interior designer employed by an interior design studio
  - Worked as director of e-commerce, and maintained popular personal Facebook and Twitter accounts
- After horrific auto accident in 2009, Maremont was off work for several months
- Employer was alleged to have access to her Facebook and Twitter accounts and to have posted promotions during her convalescence
  - Allegedly did not stop after being asked, and activity stopped only when Maremont changed her passwords

Maremont v. Susan Fredman Design Group (cont.)

- Maremont brought claims for false endorsement under the Lanham Act, violations of her right to publicity and privacy
- On motion to dismiss, the N.D. Illinois allowed Lanham Act and publicity claims to go forward:
  - Maremont alleged independent professional reputation separate from employment
  - Maremont alleged facts sufficient for postings to be considered use of her name and likeness

Maremont v. Susan Fredman Design Group (cont.)

- On the fuller record of summary judgment, the Court dismissed the publicity claims:
  - Password information for both personal accounts was maintained on employer computers and used by employer personnel with permission
  - Alleged impersonated Facebook postings not of record
  - Tweets did not constitute misappropriation of publicity rights
    - Very first such Tweet was link to website posting about accident and replacement editor for the company blog
    - First Tweet after employee's return thanked her replacements on the blog
  - Employer did not pass itself off as Maremont in the 17 Tweets at issue

Maremont v. Susan Fredman Design Group (cont.)

- Final claim under Lanham Act fully briefed for summary judgment in 2013:
  - Employer argues that because Maremont remained affiliated (employed) by employer during alleged violations, there can be no Lanham Act violation as a matter of law
  - Employer argues that Maremont can show no economic harm
  - Employer argues that Maremont's claims of mental distress from social media posts are not a cognizable form of Lanham Act harm
- Lesson: Even weak claims may result in years of litigation

Other Social Media Account Cases of Interest

- *Avepoint, Inc. v. Power Tools, Inc.*, 2013 WL 5963034 (W.D. Va. Nov. 7, 2013) – Defendant made allegedly false Tweets from employee accounts and created fake LinkedIn profiles using the plaintiff's name and trademarks. In motion to dismiss:
  - Tweets were actionable defamation
    - Suggested plaintiff U.S. company was Chinese
  - Fake LinkedIn accounts were actionable trademark infringement and false advertising
    - Fake account name was "Jim Chung" and listed location in China

Other Social Media Account Cases of Interest (cont.)

- *Eagle v. Morgan*, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013) – Employer took control of employee LinkedIn account for 6 months post termination, and the employee (a former executive) sued under various theories. The Court held:
  - Employer misused name in connection with advertising through LinkedIn account during this period
  - Employer violated employee's privacy
  - Employee failed to establish compensatory damages and punitive damages were not warranted

Issues on the Horizon

- Lanham Act cases over hashjacking and other social media “ambush” marketing tactics
- Heightened scrutiny of sponsored social media content
  - Employee reviews/comments
  - FTC enforcement
- Additional cases over ownership of social media accounts operated by employees

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Thank you for joining us.

Questions? Please email evilleda@mayerbrown.com