

Social Media in the Workplace

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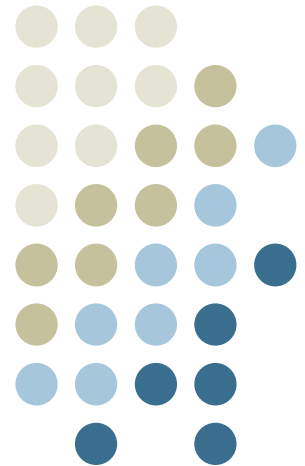
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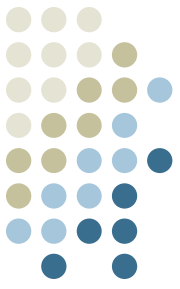
Understanding Social Media...



- Visiting social sites is the #1 most popular online activity (ahead of personal e-mail)
- 74% of people using the internet visit social networks
- 3 out of 4 Americans use social technology
- Average American spends 3 hours, 6 minutes online each day
- Time spent on social networks is growing at 3x the overall Internet rate and accounts for approximately 10% of all internet time



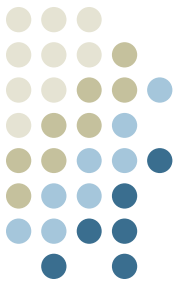
What Stages of Employment does Social Media Impact?



1. Pre-Employment – Recruiting/Hiring
2. Employment – Policies, Conduct, etc...
3. Termination

....Essentially ALL STAGES!!!

Pre-Employment – Recruiting and Background Checks



Advantages?

Free....ish

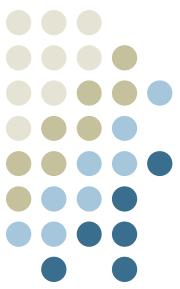
More Information...

Information is obtained Faster...



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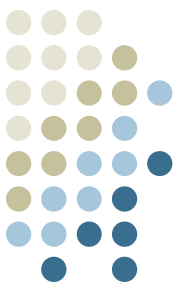
Potential Legal Exposure from using as a Recruiting tool?



YES!!!! MUST BE CAREFUL –

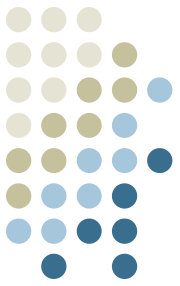
- Discriminatory language in job posting
 - “cutting edge digital native”
 - “Recent graduates” or “Class of 2018 preferred”
 - “clean background check”
- Targeted Ads....
 - Facebook ads allow you to identify demographics of who you want to reach....

Pre-Employment Background Checks



- FCRA implications, if a Third-Party consumer agency is used.
 - Does the background check include social media searches (increasingly normal...)?
- Internet searches are NOT illegal and have become a common form of conducting informal background checks – HOWEVER –
 - Employers cannot force/require applicants to provide access to social media or other electronic accounts.
 - Precautions should be taken to avoid discrimination...

Pre-Employment Background Checks

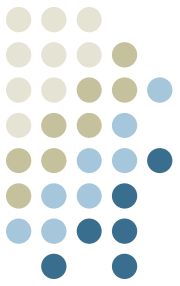


Employers may learn about a Protected Status.

- **BE CAREFUL!** - Using “Google” to conduct background checks on applicants could create inference/appearance that decision was based upon that protected status information....creating Liability.
- **EXAMPLE:** Mugshots.com – Displays mugshots of individuals who have been arrested...but not always convicted.
 - Under most states’ laws, including Illinois, it is *per se violation of law* to use an arrest against an applicant or employee (generally speaking).



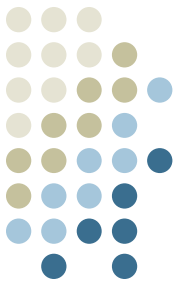
Pre-Employment Background Checks



Best Practices when using Social Media Searches

- Do NOT ask for Passwords or “Friend” person... State law and federal Stored Communications Act.
- Have someone not directly involved in hiring do it – preferably someone in HR who has received training
 - Should act as gatekeeper and provide decision maker information that does not identify any protected status and is business related.
- Be consistent and look later in process.
- Document Information used.
- Consider source (i.e. candidate’s own posts).

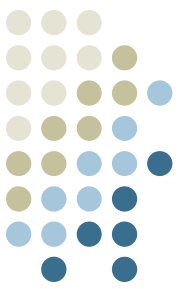
Can Employee's Behavior On Social Media be Protected? **YES!**



- Discrimination laws
- Defamation
- IL Right to Privacy Law
- National Labor Relations Act (NLRA/NLRB)



During Employment?

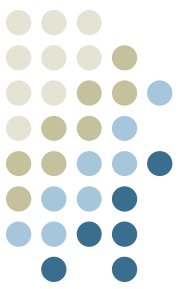


What happens when an Employee's offensive post is brought to your attention?

- If there is a social media policy in place, and an Employee violates it, can they be subject to discipline, up to and including termination? **YES!**
- If the Employee's post violates a different policy, like harassment or discrimination, can they be disciplined or terminated? **YES!**
- **BUT.....Must be Careful.....**



Employees on Social Media/Web can Create PROBLEMS in the Workplace

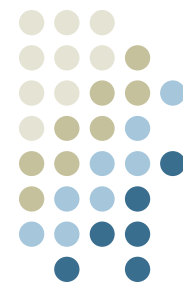


Discrimination and Harassment issues

- Porn/Dating/Hate sites
- Memes/Gifs...(Email “Forward” 2.0)
- Discriminatory, harassing or inappropriate Posts
- Discriminatory, harassing or inappropriate messages



Discrimination Case Law



Roy v. Correct Care Sols., LLC, 914 F.3d 52, 63 (2019) – Plaintiff claimed hostile work environment, including allegations of co-workers sending degrading comments about women over Facebook, while off duty.

- Employer argued that because messages were made while off-duty they were not Employer's concern.
- Court held messages still adversely affected the plaintiff's working conditions and the Company's supervisors were aware of the harassing conduct, but did nothing, thus forming the basis for employer liability.



Employees on Social Media/Web can Create PROBLEMS in the Workplace

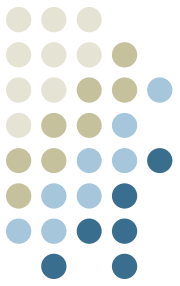


Libel / Slander / Defamation – Traditionally difficult to prove... but growing between employees and employee and company.

- **Definition:** Statement is Defamatory if it tends to cause harm to the reputation of another by lowering that person in the eyes of community or deters third persons from associating with them.
- **Types:**
 - Defamation Per Se: statements are “so obviously and materially harmful” to the plaintiff that injury to his/her reputation is presumed.
 - Examples: Commission of a crime; infection with a loathsome disease; unfitness or lack of integrity in employment; or words which adversely reflect on one’s abilities in his business, trade or profession.
 - Defamation Per Quod – actionable even where the defamatory character of the statement is not apparent on its face.



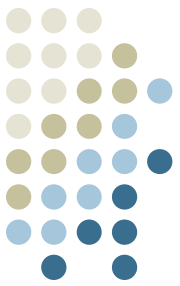
IL Right to Privacy in the Workplace Law



- Employers cannot insist on accessing an Employee's "personal online accounts" ---
 - The definition of "personal online accounts" includes all "online accounts" "used by a person primarily for their personal purposes."
 - Email, social media, etc...
- Employers cannot "request, require or coerce" an Employee to:
 - Provide a username or password to any personal online account;
 - Authenticate or access a personal account in the presence of the employer;
 - Invite the employer to join a group affiliated with any personal account; or
 - Join an online account established by the employer.



IL Right to Privacy Law



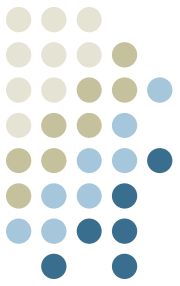
HOWEVER...Employers **MAY ASK** an employee to **SHARE** “specific content” from a personal online account when:

- Attempting to comply with applicable state and federal law;
- Investigating an allegation that an employee made an unauthorized transfer of confidential or proprietary information to a personal account;
- Investigating an allegation of illegal activity, a regulatory violation, or employee misconduct; or

Employers may also prohibit an employee from operating a personal online account during business hours, while on company property, while using a company electronic device, or while using a company network.



NLRB/NLRA

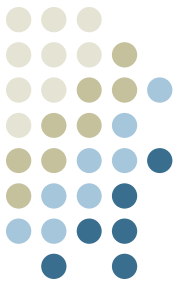


Section 7 of the NLRB protects “concerted activity”...
BUT what constitutes “protected, concerted activity” in
the world of social media and the internet?

- NLRB held that the medium for communication should not impact the determination of whether the communication constitutes protected activity under Section 7.
- Regardless of whether employees engage in discussions regarding the terms and conditions of their employment in the break room at work or, instead, over social media, these discussions are “protected concerted activity.”
- Obama’s Board = anything that MAY have a chilling effect is bad
- Trump’s Board = anything that WILL have a chilling effect is bad



THE CHIPOTLE CASE (NLRB)



Management confronted an employee who used Twitter, to complain of low wages, being required to work on days when heavy snow fell and public transportation was not operating and that Chipotle, unlike its competitor, Qdoba, charged customers for guacamole.

- Management met with the tweeting employee, provided a copy of the social media policy and asked him to delete his tweets due to violating the policy. Employee deleted tweets....but was then subsequently fired for circulating a petition about break times...



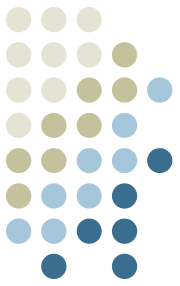
THE CHIPOTLE CASE (NLRB)



- ALJ found asking to delete tweets violated NLRA...but the Board disagreed.
 - The Board found his tweets did not amount to concerted activity because they were not directed at his fellow employees.
- ALJ recognized Board's position that employers cannot prohibit use of logos or trademark while engaged in union activity during non-working time, BUT employers may protect proprietary interests, including trademarks/logos.
 - Must narrowly tailor policy to prevent improper use that would impact Company's intellectual property rights.



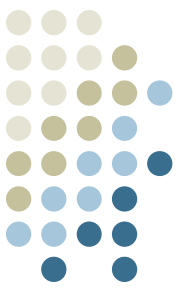
THE CHIPOTLE CASE (NLRB)



- Chipotle's policies prohibiting employees from posting "incomplete, confidential, or inaccurate information" and preventing employees from making "disparaging, false, [or] misleading" statements were unlawful....because:
 - "Confidential" was not defined.
 - "False" statements was overbroad...under NLRB precedent false statements are protected unless malicious, knowing or recklessly false
 - Employees have a protected right to make "disparaging" statements about the terms and conditions of employment.
- NOTE: Even though Chipotle had a disclaimer that it's policy was not intended to violate the NLRA, the Board found such did not cure the unlawful provisions....



NLRB Case Study

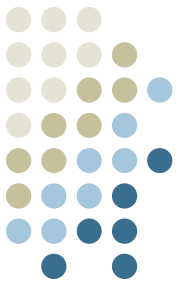


Baysys Technologies, LLC, 357 NLRB No. 28 (2011) -

- Employees posted complaints on Facebook about employer issuing their paychecks late. A week later, a newspaper published the Facebook discussions.
 - Employer sent an email to employees saying that the employees violated their nondisclosure agreements.
 - Employer terminated the employee who made the initial Facebook post.
- Board held employees engaged in protected concerted activity, and that the employer violated the Act when it discharged an employee for engaging in such activity and discouraged others from doing so.



NLRB Case Study

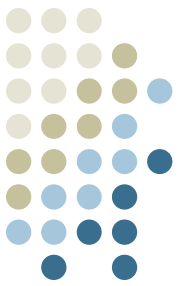


Hispanics United of Buffalo, Inc., 3-CA-27872 (ALJ, 2011)

- Employee posted on her Facebook wall: “Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB I about had it! My fellow coworkers how do u feel?”
- Four coworkers responded by posting: “What the Hell, we don’t have a life as it is, What else can we do???” and “Tell her to come do [my] f-ing job n c if I don’t do enough, this is just dum.”
- Employer terminated all five employees for their posts.
- NLRB held that the employee statements regarding staffing levels were protected as long as they implicate working conditions.



NLRB Case Study

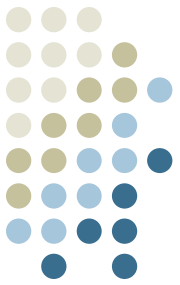


Skinsmart Dermatology, NLRB No. 4-CA-94222 (2013)

- Ten current and/or former employees engage in FB discussion that includes vulgar rants regarding conversation with supervisor, including that she told supervisor to "back the freak off," that certain supervisors "are full of shit" and "FIRE ME . . . Make my day. . . .".
- Another employee reported and the employee was terminated
- NLRB held statements were NOT protected, because it did not involve conversation with other employees over the terms and conditions of employment.



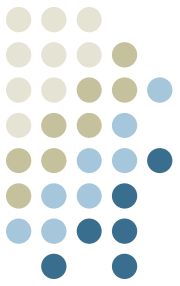
Take-Away from these NLRB Decisions for Employers



- Statements NON-SUPERVISORY employees make over social media are usually considered protected activity if they implicate working conditions or other conditions of employment.
- The statements must be “concerted” in order to be protected under the law – that is, in the social media context, it usually will not be enough that another employee simply reads his or her co-worker’s Facebook post – that employee also has to respond to the post or, at the least, “like” that post.
- Carefully draft Social Media policies....having a disclaimer is NOT enough
- If you have ANY questions or doubts, confer with labor and employment counsel.



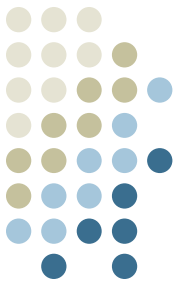
Tips for employers in creating Social Media policies:



- Confidentiality provisions must be narrowly tailored – employers should clearly define the types of “confidential” or “private” information that is restricted.
- Do not include any language which may reasonably be interpreted as:
 - (1) Prohibiting discussion among employees regarding the terms and conditions of the employment; or
 - (2) Attempting to prohibit the dissemination of misinformation or disparaging comments criticizing the employer online.
 - > but, DEFAMATORY OR HARASSING comments cross the line!



Tips for employers in creating Social Media policies (Cont'd)



- Use Common Sense....
- Focus should be respect and common sense...
i.e. prohibiting discrimination/harassment.
- Employees should be advised that they have the right to speak and use social media, but that discretion in avoiding conflict is likely the best path.



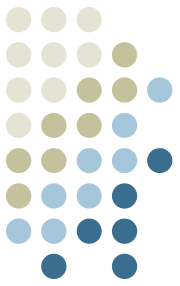
Tips for employers in creating Social Media policies (Cont'd)



- Remind Employees of their Personal Responsibility to:
 - **Ensure** that your social networking conduct is consistent with all policies contained in the Employee Handbook
 - **Ensure** that online activities do not interfere with your job performance
 - **Review and ensure** that all activity is in line with the Company's Social Media, Conflict of Interest, and other policies.
- Remind Employees that:
 - They may have identified themselves as a Company employee or the Company as their employer, either directly or as part of a profile
 - Their actions outside of work, can impact the workplace and their employment.



Tips for employers in creating Social Media policies (Cont'd)



- **Remember to Address possession/ownership of social media accounts:**
 - **Example:** As part of Employee's job he develops and maintains social media sites for Company, including a Facebook, Instagram and LinkedIn accounts. Sites develop a large following.
 - When Employee is terminated, Company asks him to turn over the login and passwords for the accounts. Employee refuses and instead continues using the account, including posting disparaging statements regarding Company (that aren't true, but not false).
 - What are the Company's options?
 - Ask Social Media Sites to shut accounts down
 - File a lawsuit for misappropriation, conversion and interference with economic advantage



THANK YOU! Questions?



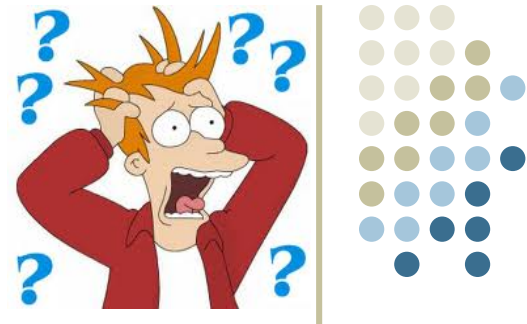
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