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The Legal Minefield Of Social Media Policies

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Biography



Lesley Pate Marlin concentrates her practice on labor and employment counseling and litigation. She represents employers in a variety of industries, including hospitality, entertainment, trade associations, non-profit organizations, and education. Ms. Marlin counsels her clients on employment practices, policies, and decisions and assists them in developing strategies to achieve their business objectives while minimizing the risk of litigation and complying with the various employment laws, including Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) (Title I and Title III), the FMLA, the FLSA, USERRA, state leave laws and state wage and hour laws. She conducts training for employers on equal employment opportunity compliance, sexual harassment, disability or religious accommodation, FMLA, performance reviews, and employment law developments. She defends employers in federal and state courts in the District of Columbia, Maryland, and Virginia, as well as in arbitration and before administrative agencies.

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What's All The Buzz?



See ya later - I'm taking these social media accounts and I'm going home, bye!

Uh oh...



Former Employee



Business



NLRB Case

- Regional Director → NLRB → complaint against American Medical Response, an ambulance service
- 2 alleged violations of law
 - AMS unlawfully terminated an employee for posting negative remarks about her boss on Facebook; and
 - AMS's internet use policy unlawfully prohibits employees from making negative comments about the company or discussing the company at all without the company's permission



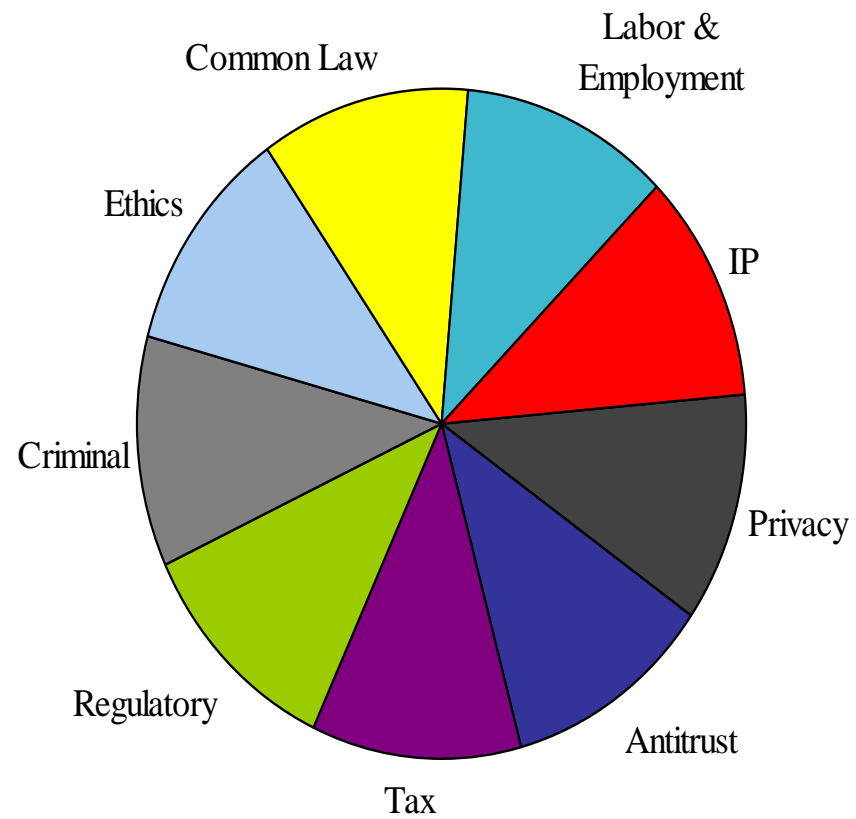
Social Media – Everywhere



- Facebook: More than 500 million active users
 - People spend over 700 billion minutes per month on Facebook
- Twitter: Over 160 million users
- LinkedIn: Over 85 million users
- Over 77 million Americans visit blogs; over 346 million blog readers worldwide



Laws – Evolving



Creating and Implementing An Effective Social Media Policy

- Creating
 - Be clear and organization-specific
 - Be consistent with other organization policies and procedures
 - Require compliance with other organization policies and procedures
 - Focus on conduct – both do's and don'ts
 - Distinguish between business and personal use
 - Create a reporting procedure
 - Establish a compliance framework and designate a compliance officer
 - Use appropriate disclaimers
- Implementing
 - Notice – employees & members
 - Mandatory training
 - Monitoring



Limit Apparent Authority And Protect Corporate Identity



- Limit individuals who have authority to speak on organization's behalf & then prohibit all others from claiming or implying authorization to speak on organization's behalf
 - Create process for gaining authorization to speak on organization's behalf
- Prohibit unauthorized individuals from using organization's intellectual property, logos, trademarks, and copyrights in any way or manner
- Prohibit employees and members from using organization's name in any online identity (e.g., username, screen name)



Protect Confidential Information And Trade Secrets

- Prohibit employees and members from disclosing confidential information and trade secrets
 - Clients, customers, partners, affiliates
 - Financial information (pricing, revenue, expenses, etc.)
 - Development strategies and plans
- Dovetail with any restrictive covenant language (non-competes, non-solicitations, NDAs)



Protect Privacy & Prohibit Disparaging/False Information

- Protect privacy
 - Employees and members may not write about, post pictures of, or otherwise refer to any employee, member, vendor, supplier, business partner without that person's permission
- Prohibit disparaging/false information
 - No one may give a professional reference to a co-worker, former co-worker, vendor, customer, or any other individual without permission of HR or appropriate organization official

LinkedIn



Prevent Unlawful Conduct

- Prohibit posting of material that may be construed as discrimination or harassment based on race, ethnicity, color, national origin, sex, age, disability, religion, or any other legally protected characteristic
- Prohibit unlawful use of trademarked or copyrighted information
- Prohibit unlawful/criminal conduct
 - Cyber-stalking, cyber-bullying
 - Hate crimes
- Require compliance with all applicable laws



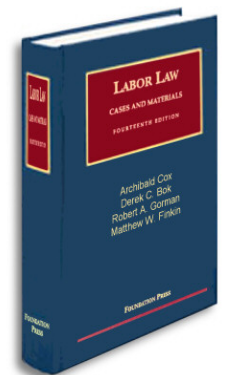
Prevent Unlawful Conduct

- Prohibit posting of material that is abusive, offensive, insulting, humiliating, obscene, profane, or otherwise inappropriate regarding organization or its employees, members, partners, etc.



Consider Labor Law Concerns

- NLRA applies to ALL employers
- Employees have § 7 rights to concerted activity
 - Employees can get together to discuss workplace activity related to their interests as employees
- Prior NLRB decision → Sears case → upheld social medial policy that clearly defined prohibited activity b/ most of it did not interference w/ § 7 protected activity
- But new NLRB complaint
- Lesson → stay tuned for future developments



Red Flag Recommendations



- Proceed w/caution before taking any disciplinary action against employees for violations of social media or internet use policies (especially personal use); and
- Proactively review existing policies carefully and consider whether revisions should be made to minimize legal risk
 - Abusive, offensive, insulting, humiliating, obscene, profane, vs. inappropriate



Address Employee Use Of Social Media

- Employees have no Constitutional right to privacy in the workplace
 - First Amendment (freedom of speech) N/A;
 - Fourth Amendment (searches + seizures) N/A
- But need clear + reasonable policy that sets out expectations and restrictions on usage
 - Policy should reduce expectation of privacy on organization's computers, e-mails systems, blackberry/PDAs, and telephone/voicemail systems by:
 - Notifying employees that information exchanged via social media can be monitored and accessed by the organization;
 - Expressly state no expectation of privacy when using organization's systems, even with personal use or when telecommuting
 - Reserve right to remove content without notice
 - Remind employees about privacy settings
- Some states have specific restrictions on monitoring employee use



Address Employee Use Of Social Media

- Address business vs. personal use
 - Define what constitutes legitimate business use (and by whom)
 - Consider adopting process to govern business use of social media
 - Remind employees that they are personally responsible for any of their social media postings
- Distinguish between on-the-job and off-the-job
 - Govern off-duty conduct only if it presents and conflict of interest and is reasonably related to the job



Address Endorsements And Testimonials

- 2009 → FTC revised its Endorsement Guides to include social media
- No false advertising or misleading sales pitches
- Bloggers or “word of mouth” (or other social media) marketers who receive money or in-kind payments, including product samples, must disclose relationship
- Employees – if discussing organization’s products or services → disclose relationship
 - Note: Fundamental tension
- Adopt policy and procedures to make sure bloggers disclose relationship & monitor compliance



Ensure Compliance With Other Laws

- **Electronic Communications Privacy Act**
(Wiretap – consent and business exceptions)
- **Stored Communications Act** (improper access of electronically stored information)





Questions?

