

Employment Law

Commentary

What is your company's policy?

Giancarlo Urey and Christine Lyon

Currently, there are more than 500 million Facebook members, more than 93 million Twitter users, and more than 75 million LinkedIn users (not to mention users of other social media websites).¹ The conclusion is evident—social media use is not going away. In spite of these astounding numbers, however, a recent study revealed that only 20 percent of companies have a formal policy regarding the use of social networks.² Not surprisingly, claims relating to social media use in the workplace have started to reach the courts. Indeed, issues regarding employer-employee relationships and social media use are poised to become a significant litigation issue in the future. Thus, a company should anticipate the potential issues that arise from an employee's use of social media and address them accordingly in a social media policy.³

Key topics for social media policy

Given that each company has its own different corporate culture and goals, there is no one social media policy that will work for all companies. An effective social media policy is tailored to the particulars of the business and industry for which it is being adopted. Nevertheless, there are certain key topics that should be addressed in any social media policy.

Clarifying who may (or may not) speak on the company's behalf.

Employees should make it clear that their postings should reflect their personal points of view, not necessarily those of the company. Typically, a social media policy will provide disclaimer language that an employee may use when identifying himself or herself as a company employee, stating that the views being expressed are his or her own, and not necessarily the company's views.

Educating employees about the company's policies concerning endorsements of the company's products.

Eager employees may decide to post positive reviews or endorsements of the company's products in order to promote its business. This can raise several risks, including the risk that the endorsement may be factually inaccurate or misleading, or may be viewed as an improper endorsement under the FTC's updated Guides Concerning the Use of Endorsements and Testimonials ("Endorsement Guide").⁴ In particular, the Endorsement Guide requires disclosure of any "connection" between the endorser and the company "that might materially affect the weight or credibility of the endorsement."⁵

Accordingly, a social media policy should educate employees about the company's approved policies and procedures for endorsements. Among other provisions, the policy should advise employees to identify themselves as such if they comment on a company-related issue and to state that they are expressing only their own views. A properly drafted social media policy can reduce the risk of improper or unlawful endorsements. It also

(Continued on page 2)

EU Data Protection Directive (p. 3)

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can help to demonstrate the company's reasonable, good-faith efforts to prevent unlawful endorsements. As such, a social media policy can serve as the first line of defense in protecting against such claims.

Informing employees of the risks of negative or disparaging postings.

On the other end of the spectrum, employees may be tempted to post disparaging comments about the company's competitors, or even use social media to vent their frustrations with coworkers or customers.⁶ Social media policies encourage employees to be professional and respectful of others, and to refrain from posting statements that are misleading, fraudulent, defamatory (whether of the company or its employees or its competitors), or otherwise unlawful.

Some employers might wish that they could simply prohibit employees from making any posting or public comment related to the employer or its business, whether positive or negative. Such employers should be mindful that federal and state laws may limit their ability to prohibit employees from engaging in certain disclosures or discussions of their wages or other terms and conditions of employment.⁷ As a result, social media policies should be drafted carefully to avoid conflicts with such laws.

Address the heightened risks to confidential information.

Social media users tend to engage in frequent updates and postings, describing their activities and thoughts at any given moment. Due to the real-time nature of social media activity, companies may face heightened risks of employees inadvertently disclosing confidential information through their postings. For example, an employee might accidentally disclose confidential information by mentioning work-related projects or disclosing inside information. Social media policies can help to raise employee awareness of these risks, as well as remind employees that their confidentiality obligations apply equally to social media use.

Another emerging concern relates to the influx of location-based social media services. These services allow users to "check in" to their locations by using GPS- and web-enabled phones or similar devices, transmitting information about their location to the friends in their networks. It is not difficult to imagine scenarios in which an employee's public disclosure of his or her location during working hours may raise confidentiality concerns. By way of illustration, if a team of company employees travels to a distant city to meet with a potential acquisition target and a number of them "check in" at a coffee shop across the street from the target's headquarters, it is not difficult to imagine that this may draw unwanted attention to the otherwise confidential business trip. As location-based social media services grow in popularity, employers also may want to consider providing guidelines in their social media policies regarding the use of such services during working hours.

Reminding employees that standards of conduct still apply.

It is important to remind employees that the company's policies and standards of conduct apply equally to social media use. For example, if the company's policy is to confirm only job title and dates of employment in response to a job reference request, managers do not always realize that this policy would apply equally to job recommendations posted on social media sites.⁸

Similarly, if an employer discovers that an employee is being sexually harassed by another employee online, the employer should handle this in accordance with its standard antiharassment procedures. In a recent case, a female airline employee brought a lawsuit against her coemployees and the airline for alleged defamatory statements posted about her on a work-related electronic bulletin board. The court identified two central issues: (1) did the plaintiff put her employer on notice of the offending posts; and (2) should the electronic bulletin board be regarded as a continuation of the workplace for

harassment purposes?⁹ Even if the purported harassment is completely after-hours, off-duty, and off-premises, an investigation may be necessary to examine whether the conduct, or its effects, have spilled over into the workplace. A social media policy can support the company's standard antiharassment policy, making it clear that unlawful harassment of employees through any means will not be tolerated and may result in discipline, up to and including termination.

Notifying employees of monitoring.

In most cases, a company should have an existing technology use policy notifying employees about monitoring of files and messages created, accessed, received, or stored using the company's technology resources. It may be desirable for the social media policy to reference this policy, to remind employees that they should not expect privacy in social media accounts through company computers. An employer also may wish to remind employees that anything they post on a publicly available site may be equally viewable by the company and its management, regardless of whether the employee used the company's computers or network to make the posting.

Even if the company maintains such a policy, however, employers should consider when, why, and how they are monitoring employees' off-duty social media activity. One risk is that a curious employer may learn more than it bargained for about an employee's personal life, potentially including legally protected characteristics or activities. Another risk is that an employee might claim that the monitoring was conducted in an unlawful manner, such as through unauthorized entry of a restricted-access site. Last year, an employer was found to have violated the Stored Communications Act, when managers accessed an employee's MySpace page using a password obtained from the employee's coworker, who testified that she felt she would have gotten into "trouble" unless she provided the password when asked by her managers.¹⁰ By considering the method and scope of its monitoring

(Continued on page 3)

in advance, an employer may place itself in a better position if an employee later challenges the monitoring of his or her off-duty social media activity.

Conclusion

As described above, social media activity is an issue of growing significance to all employers. While each employer will develop its own approach to social media issues, a carefully drafted social media policy can help educate employees and reduce potential risks. The key topics described in this article will help to shape the development of an appropriate policy, and our attorneys would be happy to assist with any questions related to social media activity by employees.

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¹ Facebook Statistics, FACEBOOK.COM, <http://www.facebook.com/press/info.php?statistics> (last visited Aug. 31, 2010); Indonesia, Brazil and Venezuela Lead Global Surge in Twitter Usage, COMSCORE.COM, http://comscore.com/Press_Events/Press_Releases/2010/8/Indonesia_Brazil_and_Venezuela_Lead_Global_Surge_in_Twitter_Usage (last visited Aug. 31, 2010); About Us:

Latest LinkedIn Facts, LINKEDIN.COM, <http://press.linkedin.com/about> (last visited Aug. 31, 2010).

² Social Networks vs. Management? Harness the Power of Social Media, MANPOWER, INC., http://www.manpower.com.br/pesquisas/FP_Social_Networking_US.pdf.

³ This article focuses on issues arising under U.S. law. Employers with personnel in other countries should be aware that local laws may impose greater limitations on an employer's ability to regulate or monitor employees' social media activities. Please refer to the sidebar for information about issues arising in the European Union, for instance.

⁴ "Guidelines Concerning the Use of Endorsements and Testimonials in Advertising," 16 C.F.R. Part 255.

⁵ Id. at § 255.5. For additional information about the updated Guides and their impact on blogging or social media activity, please refer to our prior update on this topic: FTC Approves Final Revisions to Advertising Guides Concerning Endorsements and Testimonials, <http://www.mofo.com/ftc-approves-final-revisions-to-advertising-guides-concerning-endorsements-and-testimonials-10-09-2009/>

⁶ In 2008, for example, THE INDEPENDENT reported that Virgin Atlantic fired 13 staff members based on what they had posted on their Facebook accounts. According to an official company statement, "[f]ollowing a thorough investigation, it was found that all 13 staff participated in a discussion on the networking site Facebook, which brought the company into disrepute and insulted some of our passengers." A spokeswoman for the airline further stated, "[t]here is a time and a place for Facebook. But there is no justification for it to be used as a sounding board for staff of any company to criticise [sic] the very passengers who pay their salaries." Virgin Atlantic Sacks 13 Staff for Calling Its Flyers 'Chavs', THE INDEPENDENT, <http://www.independent.co.uk/news/uk/home-news/virgin-atlantic-sacks-13-staff-for-calling-its-flyers-chavs-982192.html>.

⁷ For additional information about these legal issues, please refer to our January 2010 update on [Social Media in the Workplace](#).

⁸ Recently, a social media site was the basis of another type of lawsuit—breach of a noncompetition,

and nondisclosure agreement via the social media site. On March 16, 2010, Teksystems, Inc., sued three of its former employees and their new employer, Horizontal Integration, Inc., over violation of such agreements. Teksystems, Inc. v. Hammernick, No. 0:10-cv-00819 (D. Minn. March 16, 2010). Perhaps the most interesting aspect of this case is the plaintiff's allegation that the improper solicitation occurred via social networking activity. The primary claim is that one of the defendants had connections with 16 of the plaintiff's contract employees and sent messages to those connections inviting them to visit her in her new workplace. Given the fact that this is a case of first impression, it is still unclear how the court will rule, but it provides a real-life example of the potential harm to employers that can result from an employee's use of social media.

⁹ Blakey v. Continental Airlines, Inc., 164 N.J. 38 (N.J. 2000).

¹⁰ Pietrylo v. Hillstone Restaurant Group, 2009 U.S. Dist. LEXIS 88702 (D.N.J. Sept. 25, 2009).

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EU Data Protection Directive

For multinational companies, as with any other employment policy, there is always the decision to be made about whether to have a global, one-size-fits-all policy, or whether to have local variations. That decision will largely depend upon the content of the particular policy and the differences in practice and law in the jurisdictions in which the company is operating. With social media policies, companies will usually be able to have just the one global policy but should nevertheless be sensitive to local differences.

In Europe, for example, the review of employees' use of social media will involve the processing of personal data and will therefore be covered by the Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (95/46/EC) (the "Data Protection Directive"). The Data Protection Directive requires companies processing personal data to have a legal basis for such processing and also to have a mechanism to ensure that the data is adequately protected if it is transferred outside Europe. Although the Data Protection Directive has been implemented in all European Member States, some countries have adopted different practices, and companies will need to be aware of these local differences. In the UK, for example, before reviewing employees' use of social media, companies should undertake an impact assessment documenting the considerations taken into account before reviewing. This requires companies to: (i) identify clearly the purpose behind the review and the benefits it is likely to deliver; (ii) identify any adverse impact of the review; (iii) consider alternatives to the review or different ways in which it might be carried out; (iv) take into account the obligations that arise from the review; and (v) decide whether the review is justified.