

# Workplace Notes

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PULLMAN & COMLEY, LLC ATTORNEYS AT LAW

## Social Media and Employment Law - The Next "Wave"

For employers, new social networking and communication tools like Facebook and Twitter are both helpful and headache-inducing. On the one hand, they can provide real-time communications with vendors, customers and potential customers. But on the other hand, used incorrectly, they can be a drain on resources and a source of harassment-based complaints.

While most employers are still playing catch-up to these sites, here's a warning: The "Wave" is coming and it has the potential to be one of the pre-eminent communications tools of the next decade.

So what is it?

Earlier this fall, Google launched a limited preview "Google Wave." As Google explains it: "Google Wave is an online tool for real-time communication and collaboration. A wave can be both a conversation and a document where people can discuss and work together using richly formatted text, photos, videos, and more."

Another publication described it this way: Google Wave is a real-time communication platform. It combines aspects of email, instant messaging, wikis, web chat, social networking and project management to build one elegant, in-browser communication client. You can bring a group of friends or business partners together to discuss how your day has been or share files.

While it's still in private preview mode some of our attorneys have been invited to review "Google Wave." Because it is in its very early development stages, a full critique is both unfair and unrealistic.

One of the issues early on, for example, is that it only works with people who are using it. Because it is in limited preview, there still aren't a lot of

opportunities to take advantage of it. In many ways, it's like getting one of the first fax machines and then realizing that you had no one that you could fax to.

But even with those limits, it has been useful to communicate with other attorneys and human resources professionals on the Wave to collaborate on some ideas and solutions. And here's what we found:

- While Google Wave is a new medium, employers are still going to have some of the same headaches that they have had with other communications tools. Issues such as the potential for misuse or security or document retention all still exist for the Wave. Just as employees could steal data by using the "Xerox" machine, employers could copy data and distribute via the Wave.
- Trying to keep up with each new technology will be a virtual impossibility for many employers. Thus, instead of targeting your policies to specific programs, keep your computer use and communications policies broad. It may be useful to add some DOs and DON'Ts to policies. But the rapidly evolving nature of the tools means the features are constantly changing.
- Companies should also understand that Google Wave uses a "cloud-based" technology, which is to say that it's not stored on company servers per se. Using this for collaboration and holding company information has potential but right now, the system is not secure enough that we would trust a company to put everything on there.
- As the system develops, however, new protocols may need to be put in place for record-keeping and data preservation.
- Employers must understand that Google Wave will become yet another forum for employee complaints, potential unionizing efforts and discussion. Monitoring will be tough. Employers will still need to refrain from committing violations of labor law.
- Because this is a collaboration tool, attorney-client privilege and attorney work product issues abound.

Employees will need to be reminded about the need to keep confidential communications confidential.

### *What's the bottom line for employers?*

At this early stage, and given Google's prominence in the marketplace, employers need to stay up-to-date on developments of this new communications tool.

As a tool for employees, Google Wave may be a boon in particular areas where e-mail breaks down. One of its particular strengths is as a collaboration tool (like a wiki). As a compliance and litigation issue, however, this is untapped territory. For example, how do you put a "litigation hold" on a Wave? Employees may be quick to jump in to use this - but without the controls in place at the company to understand how it should be used, employers shouldn't just open the flood gates yet.

If there are a few thinkers, though, at your workplace who do want to give it a try, let them do so with supervision but remind them that they should be cautious about its use particularly on anything confidential regarding the company. One project, for example, could be to develop new social media guidelines for your company.

For more information, please contact Daniel Schwartz at 860.424.4359 or by email at [dschwartz@pullcom.com](mailto:dschwartz@pullcom.com).

### **Gesundheit PLUS - How to Manage the Flu in Your Workplace**

We've all heard more than we'd like to about sneezing into our elbows, where long lines are forming for too few doses of H1N1 ("swine flu") vaccine and false claims of "miracle cures" and preventive properties of various products. However, this flu season is giving many employers a taste of disaster management and a yen for more effective planning. This article briefly highlights employment law issues that arise in the flu pandemic.

### *Absence Control and Leave Rights*

Encouraging sick employees to stay home is a key tactic in limiting the spread of the flu. Even those who are not themselves ill but living with kids or others that have the flu should really stay home until everyone in the home has been fever-free (without medicine) for 24 hours. That advice can be hard to follow for an employee living paycheck to paycheck, when a day off means a short check. Of course, that's where paid sick time and other paid time off benefits come into play. Permitting use of these benefits for family illness is useful. Some employers permit employees who exhaust these benefits to "borrow" paid time that will be earned in the future. Many employers are exploring flexible scheduling, work-from-home and other alternative arrangements.

It is permissible to require an employee to stay away while sick even if there is no arrangement in place to pay for the absence. Of course, compliance with all minimum wage and overtime rules is not suspended by the flu pandemic. Make sure you are treating exempt employee absences consistently with the "salary basis" component of the exemption. Make sure unpaid time does not include work and make sure you are maintaining accurate records of time worked and payments.

FMLA (Family & Medical Leave Act) reinstatement and other rights rarely apply in flu situations because the illness is generally too mild to qualify as a serious health condition triggering FMLA leave rights.

### *Information Collection and Dissemination*

Keeping your management and your staff informed about the pandemic's progress, the best medical advice available and government programs in place to ease the impact of the flu pandemic can help avoid an equally troublesome phenomenon: panic and fear. There is plenty of junk information, sensationalized journalism and plain old mistake-riddled gossip being consumed by your employees. A voice of informed reason can go a long way towards calming fears and keeping your workforce focused on actually helpful steps. An excellent source of information is [www.flu.gov](http://www.flu.gov), a federal government website that provides easy access to information from the Centers for Disease Control

and various other federal agencies, including the Department of Labor and the Equal Employment Opportunity Commission, about how the pandemic is being experienced and how employers can and should lawfully respond.

Many employers ask if they can undertake testing to determine which of their employees has H1N1. First, the testing process is costly and time consuming and likely not worth the effort. (Even physicians are not regularly testing patients with flu-like symptoms to determine which kind of flu is present, because treatment options are not different.) Secondly, any employer subject to the Americans with Disabilities Act (15 or more employees) or the Rehabilitation Act (some federal government contractors) is prohibited from making medical inquiries or requiring medical testing of current employees unless the information request is job-related and consistent with business necessity. The EEOC takes the position that generally the flu does not present circumstances that let inquiries meet that test.

Other employers want to ask employees if they are likely to be affected by a widespread flu infection in their ability to perform their jobs. This is a dangerous open-ended inquiry because it is likely to elicit confidential medical information. A better approach is to ask all employees whether any circumstance would make them particularly likely to require time off in the event of a flu outbreak in your community. The inquiry could even list some examples of circumstances that have that effect: reliance on carpooling, chronic health condition, school age children, etc., but should only ask the employee to indicate a likely need for some absence, NOT the reason for the need.

### **Requiring Vaccination**

Aside from supply and priority issues, questions arise about whether the employer can require employees to be vaccinated as a condition of continued employment. The federal government agencies opining on the matter give a qualified “yes” answer. Any religious objections to vaccination have to be accommodated. As a practical matter, however, those who are opposed to vaccination can be vocal and insistent. New York State’s initial move to make nurse vaccination mandatory caused quite a hubbub with the result that the requirement was withdrawn.

### **Other Compliance Areas**

The Occupational Safety and Health Act (OSHA) has a general duties clause that requires the employer to make the workplace safe from known hazards. Take standard precautions like posting hand washing instructions, providing hand sanitizers, increasing cleaning of common areas and sending home sick workers.

The National Labor Relations Act (NLRA) requires notice and cooperation with any certified collective bargaining representative of your employees before changing any terms or conditions of employment. If your employees are unionized, involve the union in developing the response to the pandemic. Even non-unionized employees have NLRA rights. Employees who authorize one of their number to express a concern to management are exercising a protected federal right for which they cannot be punished. Even a lone acting employee who addresses with management a safety matter with application to a group of employees enjoys this protection.

### **Attorney Notes**

Editors of the *ABA Journal* selected the Connecticut Employment Law Blog, published by Pullman & Comley Labor and Employment attorney *Daniel A. Schwartz*, as one of 2009’s top 100 best websites by lawyers for lawyers.

Pullman & Comley Labor and Employment attorney *Joshua A. Hawks-Ladds* has been appointed as chair of the Executive Committee of the Labor & Employment Section of the Connecticut Bar Association (CBA).

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